

1                   NEW JERSEY PRIVACY STUDY COMMISSION  
2   ON  
3                   HOME ADDRESSES AND TELEPHONE NUMBERS IN  
4   GOVERNMENT RECORDS  
5  
6   PUBLIC HEARING

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11               AT:   RUTGERS   LAW SCHOOL (NEWARK)  
12                       Center for Law & Justice - Room 125  
13                       123 Washington Street  
14                       Newark, New Jersey 07102  
15               DATE:   WEDNESDAY, NOVEMBER 12, 2003  
16               TIME:   4:02 p.m. to 6:45 p.m.

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21                       GUY J. RENZI & ASSOCIATES  
22                       824 West State Street  
23                       Trenton, New Jersey 08618  
24               (609) 989-9199 TOLL FREE (800) 368-7652  
25                       <http://www.renziassociates.com>

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1        S U B C O M M I T T E E    M E M B E R S :

2

3        ROSEMARY KARCHER-REAVEY, Chairwoman

4        GRAYSON BARBER

5        THOMAS CAFFERTY

6        PAMELA McCAULEY

7        JACK McENTEE

8        H. LAWRENCE WILSON, JR.

9

10       B O A R D    P R O F E S S I O N A L S :

11

12       CATHERINE STARGHILL, ESQ., Legal Specialist

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## I N D E X

3

WITNESS

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OPENING COMMENTS

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by Chairwoman Karcher-Reavey

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PUBLIC COMMENTS

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## E X H I B I T S

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DESCRIPTION

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(NO EXHIBITS WERE MARKED.)

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## R E Q U E S T S

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(NO REQUESTS WERE MADE.)

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1                   CHAIRWOMAN KARCHER-REAVEY: Good  
2           afternoon, I'm Rosemary Karcher-Reavey. I'm the  
3           chair of the Subcommittee on Public Interest.  
4           We've been having public hearings in various  
5           locations throughout the state. The public  
6           hearing is hosted by the Public Subcommittee of  
7           the New Jersey Privacy Study Commission. The  
8           Commission was created under the Open Public  
9           Records Act, N.J.S. 47:1A et seq., to "study the  
10          privacy issues raised by the collection,  
11          processing, use and dissemination of information  
12          by public agencies."

13                   At this hearing we're inviting the  
14          public to comment specifically on the Special  
15          Directive's Subcommittee Draft Report, which is  
16          available on the back of the room, on home  
17          addresses and telephone numbers in government  
18          records, but to also invite the public to comment  
19          on general privacy issues raised by the  
20          collection processing use and dissemination of  
21          information by public agencies.

22                   The Special Directive Report  
23          response to Executive Order 26, in which the  
24          Governor directed the Commission "to study the  
25          issue of whether and to what extent the home





1 address and home telephone number of citizens  
2 should be made publicly available by public  
3 agencies..."

4 This Subcommittee has prepared a  
5 brief statement of its recommendations for the  
6 public to consider when making its comments.  
7 It's, again, located in the back of the room.  
8 The complete draft is available and can be  
9 downloaded from the Commission's web site  
10 [www.nj.gov/privacy](http://www.nj.gov/privacy).

11 All public comments today are being  
12 recorded by a court reporter and also  
13 tape-recorded and will be considered by the  
14 entire Commission as part of its study of  
15 issuance. We're inviting any individual and any  
16 individual representing an organization to make  
17 comments. We've tried to limit them to five  
18 minutes. But since we only have one at the  
19 moment, feel free to take as long as you would  
20 like. Please remember that we are being  
21 recorded, so don't speak too quickly which I tend  
22 to do.

23 Representatives of organizations  
24 with prepared statements, we would appreciate it  
25 if you would make a copy of the prepared



1 statement available to Catherine who's our  
2 liaison; and, again, the form to fill out  
3 indicating who you are and who you represent are  
4 also located in the back of the room.

5 If you are representing an agency or  
6 for any testimony, we'd like you to state your  
7 name address before giving your comments. And if  
8 you represent an organization, to make that  
9 available to, as I said, Catherine.

10 I know you're here to testify, so  
11 would you like to come up to the podium?

12 MR. CATE: Thank you very much.

13 CHAIRWOMAN KARCHER-REAVEY: Thank  
14 you.

15 I guess "testify" is the right word.

16 Do you need water? You may be  
17 awhile.

18 MR. CATE: I promise you I will not  
19 be awhile, although I'm happy to answer any  
20 questions --

21 CHAIRWOMAN KARCHER-REAVEY: Okay.  
22 That would be wonderful. Thank you.

23 MR. CATE: -- that you might have.  
24 I appreciate very much the opportunity to be  
25 here.



1                   My name is Fred Cate. I'm a  
2           professor at the Indiana University School of Law  
3           in Bloomington, Indiana, and I specialize in  
4           privacy law and have done so for 13 years. And I  
5           will -- but let me say just a few words by way of  
6           background and then touch on just several of the  
7           points that are in the statement I've already  
8           given you in writing. And I won't belabor that  
9           statement --

10                   CHAIRWOMAN KARCHER-REAVEY: Go right  
11           ahead then, it's helpful.

12                   MR. CATE: -- you can read it faster  
13           than I can -- faster than I can say it.

14                   CHAIRWOMAN KARCHER-REAVEY: Well,  
15           you can highlight it then.

16                   MR. CATE: I am not here  
17           representing anybody; although, I do want to make  
18           clear my research in the public records began six  
19           years ago and was funded by an organization, that  
20           is the Coalition for Sensible Public Records  
21           Access, CSPRA. And together with my colleague  
22           Richard Varn who is the chief information officer  
23           for the State of Iowa. All of the vowel states  
24           stick together. We prepared a report on Public  
25           Record Access as part of that CSPRA Project. And



1 CSPRA has funded my being here today.

2 I also want to say how much I  
3 appreciate the very public way in which you have  
4 gone about addressing these issues. I served  
5 five years ago on Indiana's Public Record Task  
6 Force. I know you do not have an enviable task.  
7 And in fact the issues were comparatively easier  
8 five years ago than they've become today. So I  
9 appreciate your willingness to listen to somebody  
10 from out of state, and I will be as brief as I  
11 possibly can.

12 I was motivated to come when I read  
13 the draft of the Subcommittee's Report concluding  
14 that there was a constitutional right in a home  
15 address and home telephone numbers, and that that  
16 constitutional right would prohibit the state  
17 from disclosing that information. I was and am  
18 concerned that that conclusion as to a  
19 constitutional obligation would both drive your  
20 recommendations -- because the Constitution is a  
21 command, it's not a policy document -- but also  
22 that other states who will look to you with great  
23 difference (ph) for work in this area, would also  
24 follow your conclusions. And since I believe  
25 that conclusion is not supported by the law, I





1       wanted to take the opportunity to at least  
2       explain why I thought that.

3               So let me address both why I think  
4       the support in the Draft Report from the  
5       Subcommittee does not stand for the proposition  
6       that home address and home telephone number are  
7       protected by constitutional law, and then let me  
8       cite some additional authority that is not  
9       mentioned in that report that I think establishes  
10      the opposite proposition.

11             Privacy rights are inherently  
12      difficult to talk about because privacy even in  
13      the Supreme Court's treatment of the issue means  
14      almost anything you want it to be. The Court has  
15      used the term "privacy" to refer to more than a  
16      dozen different interests, none of which have  
17      anything to do with the question at issue today.  
18      I think this is fundamentally at the heart of  
19      some of the confusion that surrounds the  
20      constitutional status of privacy protection.

21             We talk about a Fourth Amendment  
22      Privacy Right to be free from unreasonable or  
23      warrantless searches and seizures. We talk about  
24      the right to choose whether to have an abortion  
25      and of how to educate our children as a privacy



1 right.

2 We talk about privacy rights in  
3 terms of not disclosing information to the  
4 government or the right to associate in political  
5 groups free from government intrusion. Many of  
6 the cases, in fact, the vast majority of the  
7 cases that are discussed in the Subcommittee  
8 Report involve these types of concepts of privacy  
9 rights. They're important, they're interesting,  
10 they're just not relevant to the question of  
11 whether the government may disclose information  
12 contained in the public report. In fact, the  
13 Supreme Court has never decided a case on that  
14 question. So we look to Appellate Court cases as  
15 did the Subcommittee.

16 Now the danger here is first that  
17 many of the cases -- again, I would argue that  
18 the majority of cases talk about privacy rights  
19 not in the terms of a constitutional privacy but  
20 a statutory privacy right.

21 Statutory privacy rights are very  
22 important. I'm not in any way diminishing their  
23 importance, but they're not constitutional. They  
24 don't command the state in the way the State  
25 Legislature is not free to disagree with. So,



1       for example, the discussion of Reporter's  
2       Committee for Freedom of the Press, the FOIA  
3       privacy right case, which is the most widely  
4       cited, doesn't talk at all about constitutional  
5       privacy rights. It talks about privacy rights  
6       under a specific piece of Federal Legislation.

7                 Now the Subcommittee rests its  
8       argument on constitutional privacy rights  
9       relating to name and address on five cases. On  
10      these five cases, four of them are all actually  
11      one line of litigation dealing with Megan's Law  
12      and one case deals with the Freedom of  
13      Information Act. These cases are very difficult.  
14      I would argue impossible to use as the basis for  
15      a claim of a constitutional right.

16                First, none of them involve name and  
17      address information -- address and telephone  
18      information alone. For example, the Megan's Law  
19      cases all involve the disclosure of address, not  
20      telephone numbers deal, in connection with the  
21      fact that the person whose address is being  
22      disclosed is a sex offender. The privacy  
23      interest is much greater when you're disclosing  
24      the location of a person who is likely to be the  
25      target of harassment or retribution.



1           Even taking that fact into account,  
2       three of the cases talk only about a statutory  
3       right. There's no discussion of the Constitution  
4       at all in three of the cases. So of the five  
5       cases, three would tell us at most that there may  
6       be a statutory right to privacy that attaches to  
7       name and address to address and telephone  
8       information in connection with other sensitive  
9       information.

10           The FOIA case, by the way, the fifth  
11       case, the one that does not deal with Megan's Law  
12       deals with medical records. Again, highly  
13       sensitive information, information that everyone  
14       recognizes is subject to privacy protection and  
15       does not involve name and address at all, does  
16       not involve telephone numbers at all.

17           In any event, these five cases  
18       all -- in each and every one of them, the Court  
19       upheld the disclosure requirement. If law  
20       students were to argue before me in case on  
21       behalf of cases that uniformly ruled against  
22       them, I would consider this unfortunate  
23       precedent, and it seems the same way here. Not a  
24       single one of the cases came out in the way that  
25       would support the finding of a privacy right.





1                   Finally, I think it's worth noting  
2           that the characterization of the privacy right,  
3           statutory in most of these cases, is in fact  
4           quite weak. The Third Circuit Court of Appeals,  
5           for example, refers to the privacy right, if any.  
6           It doesn't conclude that there is a privacy  
7           right, it asserts that there may be a privacy  
8           right. This is far from the precedent necessary  
9           to say that the state of New Jersey is bound by  
10          the Constitution not to disclose address and  
11          telephone information.

12                   A greater concern are the cases that  
13          the Subcommittee report does not cite to. I  
14          picked up the report seeing its topic expecting  
15          to find it, of course, to address the Fourth  
16          Circuit case involving the Drivers Privacy  
17          Protection Act which dealt explicitly with  
18          address and telephone number information. The  
19          Fourth Circuit was the only one of the six  
20          circuits to decide Privacy Act cases that  
21          involved a First Amendment challenge to this  
22          Federal law that compels the states to withhold  
23          this information.

24                   This is what the Fourth Circuit  
25          wrote, and I think its words are absolutely on



1 point and dispositive here.

2 The Court wrote, and I quote,  
3 "neither the Supreme Court nor this Court has  
4 ever found a constitutional right to privacy with  
5 respect to the type of information found in motor  
6 vehicle records. Indeed, this is the very sort  
7 of information to which individuals do not have a  
8 reasonable expectation of privacy," close quote.

9 This conclusion seems remarkably on  
10 point. Moreover, the Court goes on to say it  
11 would be unreasonable to disclose such  
12 information because -- and again I quote, "the  
13 same type of information is available from  
14 numerous other sources...As a result, an  
15 individual does not have a reasonable expectation  
16 that the information is confidential..." close  
17 quote.

18 The Court concluded -- and again I  
19 quote -- "such information is commonly provided  
20 to private parties...We seriously doubt that an  
21 individual has a...right to privacy..." Note  
22 the Court means here any right to privacy, not  
23 merely not a constitutional right, but any right  
24 at all "in information routinely shared with  
25 strangers."



1 MS. BARBER: Professor Cate, could I  
2 ask you --

3 MR. CATE: Yes, of course.

4 MS. BARBER: -- a quick question,  
5 and Ms. Judge Reavey? I'm taking liberty here  
6 because you're a law professor, and I wouldn't  
7 ordinarily interrupt a witness. But I have a  
8 question here and I might as well ask it now.

9 Is this the Fourth Circuit decision  
10 that was appealed to the United States Supreme  
11 Court and was reversed by the United States  
12 Supreme Court?

13 MR. CATE: On Tenth Circuit it was  
14 revealed on Tenth Amendment grounds. The First  
15 Amendment the Supreme Court did not grant cert  
16 on, so the First Amendment holding is still  
17 intact. Moreover --

18 MS. BARBER: Okay. So -- all right.

19 MR. CATE: No, no, please go ahead.

20 MS. BARBER: No, go ahead.

21 MR. CATE: When the Supreme Court  
22 granted cert and then ultimately decided the case  
23 reversing the holding regarding the Tenth  
24 Amendment and the federalism issues, the Court  
25 made no comment on the First Amendment holding.



1       So even though it had the opportunity to either  
2       distinguish it or to clarify it, it was silent on  
3       it.

4                   MR. CAFFERTY:  If you -- since there  
5       may be nonlawyers who ultimately read this  
6       transcript, maybe if you could elaborate when you  
7       use the term "Tenth" -- the phrase "Tenth  
8       Amendment grounds" that you're talking about  
9       federalism.

10                   MR. CATE:  Right.  In other words,  
11       the Supreme Court granted -- took the appeal  
12       solely on the question of whether Congress  
13       possessed power to compel the states to do this.  
14       It did not agree to hear an appeal on whether the  
15       First Amendment prohibited this activity.  So the  
16       Fourth Circuit holding that their activity was  
17       prohibited by the First Amendment remained  
18       intact, but the Fourth Circuit's holding that  
19       Congress lacked the power under the Tenth  
20       Amendment was overturned by the Supreme Court.

21                   MS. BARBER:  But looking at the  
22       outcome of the case, which as you pointed out was  
23       important, the upshot after the United States  
24       Supreme Court looked at the case was that indeed  
25       drivers records could be kept confidential and





1 did not have to be disclosed.

2 MR. CATE: That's exactly right.

3 That's exactly right.

4 Although, again, I would just point  
5 out the Court did not accept the challenge on  
6 First Amendment grounds. So within the Fourth  
7 Circuit the First Amendment challenge would still  
8 be appropriate.

9 MS. BARBER: Right. And so you're  
10 saying --

11 MR. CATE: You're not (inaudible)  
12 within the fourth circumstance as we all know.

13 MS. BARBER: Well, I take your point  
14 to be that there's no constitutional right to  
15 privacy that would overcome a First Amendment  
16 interest in the driver's license records; is that  
17 what you're saying?

18 MR. CATE: I'm actually saying  
19 there's no right to privacy whatever in that  
20 information, in name and address and telephone  
21 number information.

22 MS. BARBER: Okay.

23 MR. CATE: And that the only Federal  
24 court to rule on the issue ruled that.

25 Now it would be nice if we had a



1 Supreme Court case that had ruled on this issue.  
2 It would make your life easier; it would make my  
3 life easier. I think though in part the reason  
4 we don't is because the law seems as a general  
5 matter so well settled that in order to have a  
6 right to privacy you have to have something that  
7 you could reasonably expect to be kept private.  
8 A medical record would fit that definition, an  
9 address does not. Addresses are routinely  
10 available in many sources.

11 So in order to show there was a  
12 right to privacy under any of the existing  
13 Privacy Law that the Supreme Court has  
14 recognized, you would have to show that in that  
15 particular instance that information was such  
16 that an individual could have a reasonable  
17 expectation in its nondisclosure.

18 This is, by the way, consistent with  
19 what the Supreme Court has always held in the  
20 area of the Fourth Amendment, that you could only  
21 have a reasonable expectation of privacy if, in  
22 fact, the expectation was objectively reasonable.  
23 So you had to show both that the individual  
24 subjectively believed the information would be  
25 kept private. But also that under accepted



1 standards it was reasonable to believe that the  
2 information would be kept confidential.

3 In the case of address and telephone  
4 information, there's simply no basis, there's no  
5 holding anywhere to suggest that that expectation  
6 is reasonable. Instead what we have are a line  
7 of cases, which although they do not address  
8 address and telephone information directly --  
9 because, again, I think that point has been  
10 treated as settled -- they continue to hammer  
11 home the same point that in order to withhold  
12 information, in order to protect information for  
13 privacy reasons, it is essential that the  
14 government meet its burden of showing that  
15 there is a specific and significant harm that it  
16 is preventing. This was the whole lien of the  
17 U.S. Court of Appeals for the Tenth Circuit in  
18 the 1999 case involving the Federal  
19 Communications Commission opt-in rules for  
20 telephone companies.

21 There even though the Court treated  
22 the speech at issue as commercial information  
23 because it was going to be used for an ad, and  
24 therefore gave it lower protection than we would  
25 normally expect, the Court concluded, and I



1       quote, that the FCC would have to demonstrate  
2       that the rule were necessary to serve a quote  
3       "specific and significant harm."

4                   MS. BARBER:   The State U.S. West.

5                   MR. CATE:   (Inaudible).   In fact, I  
6       include in my statement the entire quote from  
7       which that's from.   Just so it's clear, "the  
8       government must show that the dissemination of  
9       the information desired to be kept private would  
10      inflict specific and significant harm on  
11      individuals..."   Again, that is a showing that I  
12      think is difficult to do in an across-the-board  
13      manner with regard to address and telephone  
14      information.

15                   Now I want to be clear, I'm not at  
16      suggesting that there could not be a privacy  
17      interest as opposed to a right in name -- in  
18      address and telephone information.   I also want  
19      to be clear that I'm not suggesting that the  
20      First Amendment requires in every instance that  
21      the state make its public records accessible to  
22      the public.

23                   My conclusion is actually much more  
24      modest, which is to say first that the  
25      Constitution does not prohibit public access to





1 address and telephone information in the public  
2 record, that quite the opposite, the Constitution  
3 clearly permits that access and in fact  
4 encourages it. But that is merely a presumption  
5 in favor of it. It's a presumption that can be  
6 overcome in any particular case. And as I'm sure  
7 you know better than I do, many states have  
8 overcome it with regard to specific categories of  
9 information such as the address and telephone of  
10 undercover police officers or of people subject  
11 to protective orders.

12 But in order to do that, the state  
13 has to meet its burden under the First Amendment  
14 of showing that there's a reason for doing so,  
15 that the regulation has a chance of being  
16 effective, that the information is not routinely  
17 available elsewhere. And, in fact, there are  
18 very good practical reasons which I outline at  
19 the end of my statement and I don't bother  
20 rehearsing now, I think you certainly have other  
21 witnesses better able to do that, while the  
22 practical value of that information would side  
23 with the Constitution in encouraging you to keep  
24 those records as open and accessible as possible.

25 Now I'm happy if there are other



1 questions or anything that I've been unclear on  
2 to try to respond.

3 MR. CAFFERTY: Well, if --

4 CHAIRWOMAN KARCHER-REAVEY: Go  
5 ahead.

6 MR. CAFFERTY: Just maybe you could  
7 briefly summarize, again, for the record, since  
8 this isn't the whole Commission, some of those  
9 practical reasons for access?

10 MR. CATE: They probably breakdown  
11 into a number of categories. Let me just quickly  
12 highlight some of I think the more important.

13 The first being, of course, that  
14 journalists rely heavily on address information  
15 and public records for investigative stories,  
16 political reporting and other types of key news  
17 reporting. I provide in my statement specific  
18 examples of stories that relied on actual address  
19 and telephone information in public records. I  
20 also refer there to a study done by Professor  
21 Brooke Barnett talking about the extent to which  
22 journalists rely on public records.

23 Sixty-four percent of all  
24 crime-related stories, 57 percent of all city or  
25 state stories, 56 percent of all investigative



1 stories, and 47 percent of all political campaign  
2 stories rely on public records, not merely to  
3 verify a piece of information but to generate the  
4 story in the first place. So by comparing the  
5 payroll of one public organization with the  
6 payroll of another to determine ghost employment,  
7 for example, or to determine people who aren't  
8 paying proper benefits or what have you.

9 I think the use of public records,  
10 draft information public records with which we're  
11 probably all most familiar is to locate people.  
12 Attorneys use this information all the time to  
13 locate missing family members, owners of lost  
14 property, organ and tissue donors, noncustodial  
15 parents who aren't paying child support. The  
16 police use it to locate witnesses and suspects.  
17 The IRS uses it to locate tax evaders. There are  
18 many examples, again, I think very well  
19 documented.

20 And one of the most recent and most  
21 widespread nationwide was the use by Firestone  
22 and Ford Motor Company to get current mailing  
23 addresses for people who were driving cars that  
24 were subject to a recall. You know, people when  
25 they move don't think to file change of address



1 cards with the place where they bought their car  
2 five years ago, but they do tell the government.  
3 And that is a key resource for identifying people  
4 at a time that it may be critical to do so.

5 I think one of the uses which is  
6 often overlooked is the fact that particularly an  
7 economy in which so many business have no  
8 face-to-face relationship with their customers,  
9 address information is used as one way to verify  
10 customers. So, for example, if you buy a Dell  
11 commuter on-line and you provide a shipping  
12 address, they're going to verify that shipping  
13 address against the public record listing for  
14 your name and address.

15 If a different address is shown  
16 they're then going to engage in a fraud  
17 investigation to determine why you're shipping it  
18 to a different address. You may have a perfectly  
19 legitimate reason, it doesn't at all mean they're  
20 not going to ship it. But they're not going to  
21 assume that you are using your own credit card to  
22 buy a computer for yourself if you're not mailing  
23 it to your address of record.

24 We see this in many types of on-line  
25 commerce or commerce where there's is no





1 face-to-face transaction. Even check  
2 verification services, there are 1.2 million  
3 worthless checks a day cashed in this country.  
4 The primary way in which we attempt to verify the  
5 address of the person who's cashing it is through  
6 the use of address databases that are built from  
7 public records. So if we take out the public  
8 record component of that, we're going to be using  
9 other types of data to try to fill that in.

10 And as we take up more and more  
11 components -- you know, we took out drivers  
12 licenses 1998, if we take out State records in  
13 2004, at some point it's going to become  
14 impossible to provide an accurate address  
15 database against which to verify that type of  
16 information.

17 CHAIRWOMAN KARCHER-REAVEY: One of  
18 the things that has trouble us is a list of say  
19 recreation, kids who have signed up for  
20 recreation programs and all of the personal  
21 information that's involved and how you can  
22 prevent that from being considered a public or  
23 from disseminating it.

24 Do you have any comments on that?

25 MR. CATE: Well, as a law professor



1 I almost have a comment on everything, but I will  
2 try to overcome that professional difficulty.

3 I think in point in fact, part of  
4 the question would be what is that is  
5 specifically of concern? For example, if these  
6 are minors, I think you could easily craft a  
7 rule --

8 CHAIRWOMAN KARCHER-REAVEY: You  
9 think the purpose that you are a looking for the  
10 information? That's my mind frame.

11 MR. CATE: I don't actually. I  
12 would not focus on purpose. I would focus on the  
13 character of the information. So one place to  
14 start would be to say if the information concerns  
15 a minor, we're going to use a different  
16 presumption than if the information concerns an  
17 adult.

18 CHAIRWOMAN KARCHER-REAVEY: But it's  
19 the parents' identification.

20 MR. CATE: Well, let me say at a  
21 certain point I would say that information should  
22 be public. In other words, that --

23 CHAIRWOMAN KARCHER-REAVEY: Should  
24 be public?

25 MR. CATE: Should be public.



1                   That the danger, the harm that  
2           you're trying to prevent, that the State would be  
3           trying to prevent by not making it public is not  
4           sufficient; it's annoyance; it's getting junk  
5           mail; it's a harm that --

6                   CHAIRWOMAN KARCHER-REAVEY: We were  
7           thinking more predators.

8                   MR. CATE: Right. But predators  
9           have many ways of getting addresses of children.  
10          And --

11                  CHAIRWOMAN KARCHER-REAVEY: Well,  
12          why should we give them another one when it's  
13          just a registration form for a recreation league?

14                  MR. CATE: Exactly. But the  
15          question would for what other information is  
16          being released with that. So if, for example,  
17          the State is releasing not only the address but  
18          also the ages or the gender of the people who  
19          register, that might suggest disaggregating that  
20          information so not the whole record would be  
21          public just as today in many states social  
22          security numbers are removed from records before  
23          they're released.

24                  I think that type of more selective  
25          approach so that literally -- and this is what



1       many states do -- the state would look at records  
2       or the state would obviously have its agencies  
3       look at their own records, record, category by  
4       category and say "What's the harm we're trying to  
5       prevent? What's the least restrictive solution  
6       that will prevent that harm?" And then subject  
7       that to review by this type of Commission or a  
8       Public Access Counsellor or some state level  
9       official, that that's an approach that is much  
10      more constitutionally sensitive than just the  
11      categorical elimination of records.

12               I think that's why, in fact,  
13      although some states, for example, go so far as  
14      to say the home address of all sitting judges  
15      will not be made part of the public record. Even  
16      that would strike me as unnecessarily broad, that  
17      it would make more sense "What are we worried  
18      about?" If we're worried about presumably  
19      retribution against judges, then we would look at  
20      judges who hear certain type of cases or in  
21      certain type of courts before we built in that  
22      legal presumption of nondisclosure.

23               CHAIRWOMAN KARCHER-REAVEY: And did  
24      you limit police officers to undercover agents?

25               MR. CATE: I would start there. And





1       then if there was a need to go further, I would  
2       expect the police officers to make that case for  
3       what it was that required keeping that  
4       information what is effectively secret. It's a  
5       tricky issue. On the one hand, police off --

6                   CHAIRWOMAN KARCHER-REAVEY: We found  
7       that out.

8                   MR. CATE: Well, I'm sure you well  
9       know police officers understandably have quite a  
10      serious claim about wanting to protect their  
11      families and their home addresses. At the same  
12      time, they are public servants, they're on the  
13      payroll, they're uniquely in our government, have  
14      the power to exert force on individuals, and the  
15      press and the public have a heightened interest  
16      in being able to verify "Do they live in the  
17      jurisdiction they're supposed to live in? Do  
18      they moonlight with other companies?"  
19      Information that you really need address  
20      information to be able to access.

21                   CHAIRWOMAN KARCHER-REAVEY: And we  
22      have a very strong lobby of education employees,  
23      how about them?

24                   MR. CATE: My answer would be the  
25      same. I think in almost any --



1                   CHAIRWOMAN KARCHER-REAVEY: Those  
2                   are the two that we've heard from.

3                   Anybody else?

4                   MS. BARBER: Judge, I have at least  
5                   half a dozen questions for Professor Cate.

6                   Here's what I propose: Since  
7                   Professor Cate is really one of the national  
8                   experts on privacy issues, I'd like to take this  
9                   opportunity to ask him questions not only about  
10                  the preliminary report, but also I'd like to pick  
11                  his brain about some of the other questions that  
12                  the Privacy Study Commission is going to be  
13                  looking at, like the commercial use issues and  
14                  so. But I see that a couple of witnesses have  
15                  arrived, and I have a little bit of concern about  
16                  time.

17                  So the question is how much time  
18                  Professor Cate has, whether he can stay with us,  
19                  whether the other witnesses are under any time  
20                  constraints because I feel like I have a lot to  
21                  ask.

22                  MR. CATE: I have all the time you  
23                  need, so why don't I sit down.

24                  CHAIRWOMAN KARCHER-REAVEY: Maybe we  
25                  can --



1 MR. CATE: Of course.

2 CHAIRWOMAN KARCHER-REAVEY: -- see  
3 what our other witnesses would like to say.

4 Thank you, you've been very helpful.

5 I'm certain that the gentleman in  
6 the brown suit was here first.

7 Would you like to be heard first?

8 I don't think you heard my opening  
9 remark, but what we need is your name. We'd like  
10 you to spell your last name for the reporter.  
11 And if you represent an organization, we'd like  
12 to know that.

13 MR. BAEHR: Sure, sure. Well, I was  
14 here in June before you.

15 CHAIRWOMAN KARCHER-REAVEY: We have  
16 a different reporter.

17 MR. BAEHR: Good afternoon, my name  
18 is Guy Baehr, B-a-e-h-r. I'm a founding board  
19 member of the New Jersey Foundation for Open  
20 Government. New Jersey FOG is a  
21 nonpartison/nonprofit coalition organization  
22 formed in January 2001 to advocate for open  
23 government records and meetings.

24 Our member organizations include:  
25 The League of Woman Voters of New Jersey, Common



1 Cause New Jersey, the American Civil Liberties  
2 Union of New Jersey, the New Jersey Chapter of  
3 the Society of Professional Journalists, New  
4 Jersey Citizen Action, United Taxpayers of New  
5 Jersey, Voices, and a number of other local  
6 citizen groups.

7 We are members of the National  
8 Freedom of Information CAPA (ph) Coalition and we  
9 will be hosting a national conference of that  
10 organization next May, probably right here in  
11 this room, but at least it's here at the law  
12 school.

13 All of us are united in the belief  
14 that governmental openness is dispensable if  
15 democratic soft government and accountability are  
16 to mean anything. As our courts have said,  
17 democracy dies behind closed doors. And it also  
18 dies, we would note, in locked file cabinets.

19 Today we'd like to comment on the  
20 issue of home addresses and home telephone  
21 numbers that you are considering. We would like  
22 to comment specifically on the Draft Report on  
23 this issue prepared by the Special Directive  
24 Subcommittee.

25 We urge that you not adopt this





1 report as written because we believe it is  
2 philosophically flawed, administratively  
3 impractical, unnecessarily sweeping, and a  
4 serious threat to the goal of open government.

5 We urge the Commission as a whole to  
6 take a hard look at the Subcommittee's  
7 recommendations because we believe they would  
8 significantly undermine the purposes of the Open  
9 Public Records Act and make it harder for the  
10 public to oversee the operation of government  
11 agencies.

12 Individual privacy is an important  
13 value, but these recommendations would go much  
14 further in restricting access to home addresses  
15 than the Federal government or any other state  
16 has found to be necessary or desirable. As  
17 outlined, these recommendations would be  
18 extremely difficult to administer, causing  
19 unnecessary expenses for government agencies and  
20 lengthy delays for citizens making even routine  
21 requests for government records.

22 OPRA has worked well over the 15  
23 months and there is no need to fix something that  
24 is not broken. This is a solution in search of a  
25 problem. Indeed by the report's own admission,



1 the Privacy Study Commission has received only  
2 one complaint of an invasion of privacy since  
3 OPRA took effect in July of 2002. That  
4 complaint, which is detailed on page 10 of the  
5 report, involved the Paramus Shade Tree and Park  
6 Commission.

7                   Apparently a resident unhappy with  
8 the ruling of the Shade Tree Commission requested  
9 the names and addresses of all of its members.  
10 He then went to their homes and took photos and  
11 measurements of their property in an effort to  
12 show that their ruling in his case was not  
13 consistent with some of their own practices. He  
14 also urged other residents to contact the members  
15 of the Commission about the issue.

16                   The Chair of the Commission  
17 complained to the Borough Clerk and the Clerk  
18 told the Commission that he was concerned that it  
19 could be difficult to attract volunteers for  
20 municipal boards if, quote, the public has the  
21 ability to reach workers in the public sector for  
22 harassment such as this.

23                   Let's set aside the fact that the  
24 members of the Commission volunteered for their  
25 public positions and so could reasonably expect



1       some extra scrutiny by the public. And let's set  
2       aside the fact that there might be a fine line  
3       between being harassed and being accountable.

4               The fact that this was the most  
5       egregious example of an alleged invasion of  
6       privacy committed under OPRA in more than a year  
7       telling.

8               First, it tells us that we are not  
9       facing a crisis here. OPRA has not opened up a  
10      Pandora's Box of privacy horrors that require  
11      swift or sweeping action by either the governor  
12      or the Legislature.

13              Second, it tells us that the  
14      significant privacy protections included in OPRA  
15      by the Legislature are working. Record  
16      custodians are successfully using those  
17      protections to avoid disclosing the kinds of  
18      information that most people reasonably expect  
19      will be kept in private.

20              What are some of those protections?  
21      OPRA specifically prohibits disclosure of a  
22      person's social security number, credit number,  
23      driver's license number, or unlisted telephone  
24      number. It is those items not home addresses  
25      that are sought by identity thieves.



1                   It specifically prohibits disclosure  
2       of victim's records held by victim rights  
3       agencies, and it specifically requires law  
4       enforcement agencies to consider, quote, the  
5       safety of victims and a victim's family before  
6       releasing any information including home  
7       addresses.

8                   In addition, it says such agencies  
9       may withhold any information that could  
10      jeopardize an investigation or, quote, may  
11      otherwise be inappropriate to release.

12                  OPRA also bars requests from  
13      convicted criminals about their victims and  
14      allows custodians to refuse anonymous requests  
15      for personal information including home  
16      addresses.

17                  Finally, OPRA does not interfere  
18      with the State's established address  
19      confidentiality program which allows stalking  
20      victims and victims of domestic abuse and others  
21      to shield their home addresses and other such  
22      information from public disclosure. We should  
23      submit that the Legislature got it right on this  
24      issue when it voted unanimously for OPRA.

25                  The law as it stands, and as it has





1       operated over the past 15 months, protects what  
2       most people expect the government to keep private  
3       while permitting public access to what most  
4       people consider public, where otherwise we'd be  
5       hearing many more actual rather than theoretical  
6       complaints.

7                       The impetus for the recommendations  
8       in this report appear to stem not from any real  
9       world effort to halt the significant violation of  
10      the public's privacy, but from a philosophical  
11      conviction that somehow everyone has an  
12      inalienable right to keep their home address  
13      private. That people in certain circumstances  
14      may have an interest in keeping their home  
15      address or telephone number private is clear,  
16      that has been recognized by the courts and by the  
17      Open Records Laws of every state in the nation.  
18      But to assert that there is an established  
19      constitutional right akin to free speech or a  
20      right to a fair trial defies the general  
21      consensus on this issue. We should fear no  
22      hypothetical blizzard of lawsuits on this issue.

23                      The real consensus on home address  
24      privacy is clear if we look at the Open Records  
25      Laws not only of New Jersey but of every other



1 state in the nation. No state has anything like  
2 the blanket ban on release of home telephone  
3 numbers recommended by the Subcommittee. No  
4 state has a general policy of automatically of  
5 expunging home addresses from computerized  
6 records, and no state has sought to go through  
7 every type of record kept by government and tell  
8 custodians in each case whether to blackout home  
9 addresses.

10 What other states have done is to  
11 include limited provisions in their laws to deal  
12 with specific records or situations in which the  
13 need to keep home address is secret from the  
14 public overrides the public's need to know.

15 In the majority of the states, home  
16 addresses are not specifically protected anywhere  
17 in their law. Instead, they are protected only  
18 where they are included in records such as  
19 personnel and medical records that are considered  
20 confidential. In the states where home addresses  
21 are specifically dealt with, they are protected  
22 only in specific instances such as undercover  
23 police, judges, children enrolled in recreation  
24 programs, or housing assistant recipients.

25 The Subcommittee Report lists on



1       pages 19 and 20 a number of instances where  
2       states limit the disclosure or use of home  
3       address. What is most notable is narrowly  
4       specific these provisions are. In number of  
5       cases they do not bar disclosure of home  
6       addresses but simply restrict the selling or  
7       renting of certain state lists containing home  
8       addresses or ban their use for commercial  
9       purposes such as junk mail.

10               For example, the report cites the  
11       Federal Election Campaign Acts prohibition on  
12       using FCC lists of campaign donors, including  
13       addresses, for commercial or fund-raising  
14       purposes. It does not bar inspection of the  
15       records because that would certainly defeat the  
16       purpose of the law.

17               We would like to address the  
18       Subcommittee's specific recommendations. First  
19       recommendation, it was public agency should  
20       notify the public whenever appropriate that home  
21       addresses and telephone numbers may become  
22       public. We concur with this recommendation. In  
23       many cases this would give people who have  
24       specific reasons for wanting to keep their home  
25       address or phone number private a chance to do



1       so. Where providing a phone number is optional,  
2       as it often is, they can leave it out. In other  
3       cases, they could use their work number or  
4       alternate such as a cell phone that is not  
5       connected to any address.

6                 In case of addresses, in many  
7       instances, all that is required is an address of  
8       record. This would give them a chance to use a  
9       post office box, a work address, a lawyer or  
10      accountant's address, or even a friend or  
11      relative's address as an alternative.

12                We would suggest that government  
13      agencies along with notice that an address could  
14      become public, also of the urge to inform people  
15      of the protections available under the state's  
16      confidentiality program.

17                The next recommendation was that  
18      home telephone numbers should be kept  
19      confidential. This recommendation presents a  
20      number of practical problems. It is with good  
21      reason that no other jurisdiction has tried to  
22      enact a sweeping ban since telephone numbers can  
23      pop up in many kinds of records such as listing  
24      of volunteer groups, activities and events, local  
25      service agencies, and help lines, local





1        directories, municipal and county permit  
2        applications, accident reports, official meeting  
3        minutes and many other documents. To require  
4        record custodians to go through such documents,  
5        determine which numbers are home numbers and then  
6        black them out is neither useful nor desirable.

7                        We can concur with a proposal  
8        requiring that custodians do not disclose lists  
9        of home telephone numbers where those submitting  
10       them did so with the expectation that they would  
11       be kept confidential such as staff contact lists,  
12       or emergency numbers listed school or police or  
13       social service agencies. As a many matter of  
14       practicality, we believe most such cases would be  
15       covered by broader exemptions for personal  
16       information.

17                      The next recommendation was the  
18        Legislature should identify categories of  
19        government records that should be kept  
20        confidential and provide objective guidelines to  
21        record custodians.

22                      We do not believe that most New  
23        Jersey residents have a reasonable expectation of  
24        privacy in their home addresses and phone  
25        numbers. Most people have listed phone numbers,



1     make no effort to hide their home addresses and  
2     assume that their home address is public  
3     knowledge since it is listed on property records  
4     and voter rolls.

5                     We also question the practical  
6     ability of the Legislature or anyone else to  
7     usefully divide all of categories of records kept  
8     government into two categories, those that should  
9     always and those that should always be closed to  
10    public inspection to protect individual privacy.

11                    While guidelines and precedence are  
12    useful, we believe there is no alternative to  
13    relying on the judgment and common sense of the  
14    records custodians subject to review by the  
15    Government Records Council and the courts.  As an  
16    example of that, I understand that the State  
17    agencies do not release home addresses of State  
18    employees.  Now, that probably could be tested in  
19    the courts as to whether that fits with OPRA, but  
20    that's what they're doing.  Up to now nobody's  
21    complained to NJRC or the courts on the issue,  
22    and probably the courts are the right place to  
23    make that decision.

24                    MS. BARBER:  Mr. Baehr --

25                    MR. BAEHR:  Yes.



1 MS. BARBER: -- may I, if it's okay?

2 CHAIRWOMAN KARCHER-REAVEY: Yes.

3 MS. BARBER: Is FOG taking the  
4 position that a records custodians should have  
5 discretion as to when records should be released  
6 to the public if there's some doubt?

7 MR. BAEHR: Yeah, I guess, yes, we  
8 are. We're taking the position that it's very,  
9 very difficult to try to go through every  
10 possible record and decide all of these issues.  
11 And in the fact the way that it's been done in  
12 all other sites is through the process of -- a  
13 record custodian looks at the law, decides that  
14 this, you know, fits within the law, and then  
15 that interpretation of the law may be subject to  
16 challenge either before the Government Records  
17 Council or before the courts.

18 I'm not sure where the custodians  
19 that have decided that the home addresses of  
20 State employees are not disclosable found  
21 authority for that in law, but apparently they  
22 have.

23 MR. CAFFERTY: Guy, I think  
24 analytically whether they're correct or not,  
25 analytically they point to OPRA and say OPRA



1       exempts from public access information in an  
2       employees personnel file, the home address is in  
3       the personnel file, ergo we're exempting the  
4       home. Now, whether that's a correct  
5       interpretation, but that is not without some  
6       authority or some argument in OPRA that that is a  
7       proper interpretation.

8                   MR. BAEHR: Right, right. And  
9       that's -- they're exercising common sense and in  
10      an attempt to understand the law and the intent  
11      of the law.

12                  MS. BARBER: I have to say I'm quite  
13      surprised that FOG would take that position  
14      because I would expect the position to be that  
15      you don't want to invest custodians with too much  
16      discretion because then, you know, the interests  
17      of nondisclosure might loom very large in the  
18      mind of a record custodian, and it might be  
19      better to have objective rules.

20                  MR. BAEHR: In a perfect world it  
21      would be better to have objective rules. But  
22      when you look at the range of records and the  
23      range of situations, I think that if you did try  
24      to have objective rules, what you'd end up would  
25      be closing off tremendous amounts of information





1       that don't need to be closed off just, you know,  
2       on the idea of, you know, err on the side of  
3       nondisclosure. So I think we'd rather have  
4       custodians knowing that their decision would be  
5       subject to potentially second guessing or being  
6       overturned by the Government Records Council and  
7       the courts.

8                       You know, if the decided, Well, gee,  
9       you know, some guy that looks a little flaky is  
10      coming here and he wants all the names of the  
11      swim team at the local recreation, you know,  
12      it -- you can't write that into the law, but you  
13      can expect that a custodian would use some  
14      discretion and maybe in the end be overturned.  
15      But we're trying to come up with real world kinds  
16      of things. Otherwise, you get into the thing of  
17      let's keep everything secret because someday,  
18      somehow, somebody could use this in some way that  
19      we wouldn't want it to be done. And since we're  
20      not going to be there to use discretion and  
21      common sense, let's air (ph) on the side of  
22      safety.

23                     As the last witness said and as I've  
24      said previously, this is a tremendous difficult  
25      area in which there is no black and white and



1       it's all gray and messy, and whatever you do has  
2       unintended consequences, so it is very difficult  
3       to come with something. So I guess we would take  
4       the position we'll risk a little bit of common  
5       sense of the part of the records custodians.

6                       I mean, they're going to be guided  
7       by the law, by precedent, by other decisions as  
8       we build up a body of law and precedent on this,  
9       by the Records Council -- we're fortunate in this  
10      state to have a records council that is able to  
11      guidance to records custodians. They're not out  
12      there completely on their own. They can run  
13      workshops and so forth. I don't know if there's  
14      any other way to do it ultimately messy as this  
15      way would be.

16                     MS. BARBER: Did you want to keep  
17      going through this specific recommendation  
18      because --

19                     MR. BAEHR: Sure. Actually, I'm  
20      almost done here.

21                     Well, while guidelines and  
22      precedents are useful, we believe there's no  
23      alternative to relying on the judgment and common  
24      sense of records custodians that are, as I said,  
25      subject to review by the Government's Records



1 Council and the courts. As in other states, they  
2 will do the hard work of balancing the public's  
3 right to know about its governments dealings  
4 against the individual's legitimate interest in  
5 protection his privacy and safety. Will this  
6 involve litigation? Yes, that is unavoidable.  
7 No categorical list will prevent disputes in such  
8 a complex area. And to expect otherwise is  
9 unrealistic. As in other states, an evolving  
10 body of law and practice will develop over time  
11 that will serve us better than what any  
12 commissioner or legislative committee could sit  
13 down today and try to prescribe in detail.

14 The last recommendation is that  
15 public agencies should program their computers to  
16 collect but not disclose home addresses and home  
17 telephone numbers. While this recommendation  
18 offers what might appear to be a simple technical  
19 fix for a complex problem, we urge caution. Many  
20 government records lose much of their usefulness  
21 if they are stripped of home address information.  
22 Locating witnesses for court cases, collecting  
23 debts, tracking down deadbeat parents, giving and  
24 getting credit, buying and selling property, not  
25 to mention doing solid investigative reporting



1 will all become much more difficult if home  
2 addresses begin to gradually disappear from the  
3 record.

4 Thank you for your consideration of  
5 this testimony, and thank you for taking on this  
6 complex and difficult issue. There are no easy  
7 answers.

8 MS. BARBER: Couple of questions for  
9 you.

10 First, thank you very much --

11 CHAIRWOMAN KARCHER-REAVEY: You're  
12 very helpful.

13 MS. BARBER: Thank you so much for  
14 all the work you do on this. I recognize you as  
15 one of the leaders in New Jersey on the Open  
16 Public Record issues and congratulate you on  
17 getting OPRA passed and in place. And  
18 congratulations to Tom, too. You guys have been  
19 working forever on it.

20 I wanted to ask a couple of  
21 questions. One is that with respect to  
22 recommendation number three. You made the  
23 observation that most people in New Jersey  
24 probably don't have an expectation of privacy in  
25 their home addresses and phone numbers because --





1       well, you didn't say this but they are in the  
2       phone book, right?

3                   MR. BAEHR: Right. I said that last  
4       time, right.

5                   MS. BARBER: By the way, do you have  
6       written testimony for us today?

7                   MR. BAEHR: I gave a copy.

8                   MS. BARBER: Okay, great. Thanks.

9                   But my question is, well, what about  
10       the people who do take steps to protect their  
11       privacy? How should their concerns be honored if  
12       at all?

13                   MR. BAEHR: Well, I think -- yes, I  
14       think the majority of people don't take the steps  
15       to keep the home addresses and phone numbers  
16       secret, but there are other people that do. And  
17       some of them just because they have a feeling of  
18       privacy and others because they have some  
19       particular reason. And I think that if there are  
20       ways, and I think the Address Confidentiality  
21       Program is one way, if there are ways to help  
22       people do that where it's feasible and it doesn't  
23       make important records unusable, we should try to  
24       facilitate that because that is something that  
25       people -- some people feel strongly about. And



1       if there's a practical -- if there are practical  
2       ways to do that, yes, we support that.

3                   MS. BARBER: But the practical ways  
4       would be, what? I mean, we have this Address  
5       Confidentiality Program for domestic violence  
6       victims, for example, or stalking victims. Do we  
7       have anything in place for, let's say,  
8       celebrities who might live in New Jersey and who  
9       want to have measures to protect their home  
10      addresses and keep them confidential? Are they  
11      just stuck out of luck because they have to  
12      report their addresses to the government or what  
13      should happen to them do you think?

14                   MR. BAEHR: Well, I think that in  
15      the case of celebrities and individuals who want  
16      to keep their addresses private, perhaps for  
17      safety reasons, I guess there's two ways to do  
18      it. One is you could just have a general program  
19      that allowed people to have an address of record  
20      and so forth. And in other cases where the home  
21      address would normally be in that record and not  
22      to have it could effect its value, perhaps it  
23      would be a program like the Stalking Victim  
24      Program, the Address Confidentiality Program,  
25      where you could apply to do that, but you'd have



1 to give some reasonable reason. You know, it's  
2 not like "I'm trying to avoid my ex-wife" or "I'm  
3 an escaped convict," something like that.

4 MS. BARBER: You might give -- let's  
5 take ordinary citizens who are not celebrities  
6 and who perhaps don't have extra money to set up  
7 a trust to hold their real estate and that kind  
8 of thing, but just like normal folks who maybe  
9 aren't domestic violence victims yet, or stalking  
10 victims yet but they're nervous, and maybe they  
11 don't have extra money to go get a mailbox at  
12 Mailboxes Etc. because they're frazzled already  
13 and busy with their lives and don't have extra  
14 cash on hand. Are suggesting that the State  
15 should give them some device for opting out of  
16 having their home address available for public  
17 record?

18 MR. BAEHR: We have not considered  
19 that specific issue as a group, so I'm sort of  
20 speaking off the top of my head.

21 MS. BARBER: Okay.

22 MR. BAEHR: I think there's a  
23 general feeling. I mean, we had a meeting, and  
24 one of the people on the commitment had been a  
25 stalking victim, and she had used the Address



1 Confidentiality Program to try -- so she switched  
2 her address to her mother-in-law's -- not her  
3 mother-in-law's, her aunt or somebody, but she  
4 had taken some steps to do that. So I think  
5 there may be ways that you can do that. It  
6 becomes difficult because you sort of have to  
7 inquire into the purposes because there are good  
8 purposes and bad purposes of hiding your  
9 whereabouts. So I'm not sure how you would do  
10 that.

11 I know there is an issue of opted-in  
12 and opted-out. We would be strongly against an  
13 opted-in system where we would affirmatively have  
14 to say, "Yes, you could have my address." An  
15 opted-out system would be much more palatable and  
16 I think fit the facts. The facts are that most  
17 people it doesn't bother. There are some people  
18 who it does, so let those people opt-out. Rather  
19 than saying "Well, we assume that everybody wants  
20 it secret." So I think that opted-out is much  
21 preferable to opted-in if you were to go in that  
22 direction.

23 MR. CAFFERTY: Would have any  
24 concerns that such a system would create holes in  
25 the public record --





1 MR. BAEHR: Yes, that --

2 MR. CAFFERTY: -- and the records  
3 would inherently then be not reliable as showing  
4 the full facts?

5 MR. BAEHR: That is our reluctance  
6 to say, "Yes, just let anybody opt-out." I think  
7 that a pure opted-out system would -- in concern  
8 records you might be able to do that, records  
9 that are not normally consulted and so forth.  
10 You know, for instance -- well, for instance, in  
11 notifying people that their address or phone  
12 number could become public. You would also tell  
13 them -- you'd be telling them, and maybe you can  
14 make it explicit, you know, "We only need an  
15 address of record, we don't need your home  
16 address."

17 For instance, professional licenses,  
18 which there's some objection because here you are  
19 a beautician and you're not working at a  
20 particular salon, you're working from home;  
21 you're an architect and you work from home or  
22 something like that, well, what are you going to  
23 put down either you want to be solicited or  
24 whatever. And the State doesn't really have to  
25 know where you live, they just want to have a



1 place to contact you to renew your license.

2 My wife has a beautician's license,  
3 so every few years she gets a renewal notice.  
4 And if she misses the renewal, she'd lose her  
5 license and she'd have to go back to school for a  
6 year to get the new license. She's teaching  
7 school now, so it doesn't matter. But she likes  
8 to keep her beautician's license up just in case.  
9 So it's good that the State can reach her so she  
10 does give her address.

11 But if she was concerned -- and we  
12 do get periodically, you know, solicitations for  
13 new hair treatments or beauty salon supplies and  
14 so forth, no a mass of amount. She could, I  
15 guess, put in a post office box where she could  
16 put in an address of record of some kind that  
17 wasn't her home address. So in that area that  
18 might be something that would be feasible. Would  
19 it create some gaps in the public record? As a  
20 report I'd say yeah, now I'm going to not be able  
21 to use that list as easily to track down somebody  
22 who's supposed to be a licensed childcare person.  
23 But we have all these trade-offs. Would that be  
24 a good thing to have in property records? I  
25 don't think so. Voter records? I don't think



1       so. You know, some of those records that we rely  
2       on to hold the society together. There I don't  
3       think you should have opt-out.

4                   MS. BARBER: You also mentioned that  
5       referring to the laundry list of other statutes  
6       in other states, on pages 19 to 20 of the report.  
7       You mentioned that a lot of those statutes put  
8       restrictions on the commercial use of information  
9       gleaned from public records. I'm just curious if  
10      FOG has taken a position on that kind of  
11      commercial use. Do you have any position on the  
12      kinds of restrictions that other states put on  
13      information for these purposes?

14                   MR. BAEHR: I would say that we have  
15      not taken a position on that. I think that FOG  
16      would probably be reluctant to suggest those  
17      kinds of tests, either intent of why you want the  
18      record -- you know, asking for intent of why you  
19      want the records or asking how you want to use  
20      the records. My personal feeling is, is that  
21      some of those things make sense. I mean,  
22      obviously, junk mail and spam is a concern of  
23      many people. And they perhaps rightly don't like  
24      the idea of the government just selling their  
25      address to people who use it in -- you know,



1       essentially for commercial purposes.

2                   So I think that the fact that there  
3       are a number of states that do do that, is a way  
4       of striking a balance between this sort of  
5       invasion that you get. And at the same time, the  
6       addresses are still accessible for, for instance,  
7       journalistic purposes or for purposes of not junk  
8       mail kinds of purposes. And maybe that's a way  
9       of striking the balance. I think even in  
10      California they -- you can look -- the voter  
11      records are closed, which is we don't agree with  
12      that. But at least they left them open for  
13      journalistic and academic and a number of other  
14      specific purposes so they can be examined for  
15      those purposes. So I think it does make sense.

16                   I know that in some cases the  
17      government doesn't want to give up the ability to  
18      sell these lists because it's a revenue  
19      generator. But I think most people probably  
20      would rather the government find revenues in  
21      other ways.

22                   MS. BARBER: Well, thank you very  
23      much.

24                   MR. BAEHR: Okay. Thank you.

25                   CHAIRWOMAN KARCHER-REAVEY: Very





1 helpful and insightful.

2 MR. BAEHR: Well, good luck.

3 CHAIRWOMAN KARCHER-REAVEY: Thank  
4 you.

5 Are you going to testify or are you  
6 just sitting?

7 We're going to take ten minutes for  
8 the reporter because we have a real one.

9 (Break was taken. Time is  
10 5:09 p.m.)

11 (Back on the record. Time is  
12 5:24 p.m.)

13 CHAIRWOMAN KARCHER-REAVEY: I think  
14 we are ready to come back on the record.

15 And Mr. Cate if you don't mind  
16 coming back up to the podium that would be very  
17 helpful in the reporter.

18 MR. CATE: Thank you very much.

19 MS. BARBER: Listen let me just  
20 thank you again for coming to testify. I have a  
21 lot of questions. And I feel like we've got the  
22 benefit of your presence here, so my questions my  
23 stray somewhat from the Draft Report that you had  
24 a chance to review. And if any of the questions  
25 are sort of uncomfortable or you're just not



1 prepared, we'll be in touch by way of e-mail and  
2 maybe we could bring you back --

3 MR. CATE: Whatever you want.

4 MS. BARBER: -- if we have future  
5 public hearings.

6 CHAIRWOMAN KARCHER-REAVEY: We can't  
7 afford the plane fair though.

8 MR. CATE: If the Chair will let me  
9 answer them, I'll answer them.

10 CHAIRWOMAN KARCHER-REAVEY: Okay.  
11 Go ahead.

12 MS. BARBER: As I understand it,  
13 your bottom line sort of is that the United  
14 States Constitution does not forbid governmental  
15 agencies from disclosing home address and  
16 telephone information, but it doesn't require the  
17 agencies to disclose the information either.

18 MR. CATE: That's correct.

19 MS. BARBER: Now in our  
20 question-and-answer period a little bit earlier  
21 in the evening, we talked about a specific  
22 example of, let's say, the local community  
23 recreation department might have information  
24 about you or about your children. And you  
25 suggested that it might be possible to



1 disaggregate some of the information so that  
2 nonsensitive information could be disclosed but  
3 the sensitive information would not be disclosed,  
4 the sensitive items would be removed.

5 So -- first, is that an accurate --

6 MR. CATE: Yes.

7 MS. BARBER: -- statement of what  
8 you testified? And I take it that you would say  
9 that the home address and telephone information  
10 is not sensitive?

11 MR. CATE: That's correct.

12 MS. BARBER: But I guess the  
13 question that I have is that even in that kind of  
14 record you don't deal with home address  
15 information in isolation. It's always aggregated  
16 with something else.

17 MR. CATE: That's correct.

18 MS. BARBER: I don't think there are  
19 any government records that have just a bare list  
20 of addresses and telephone numbers. They're  
21 always in combination with something. So to  
22 say --

23 MR. CAFFERTY: Well, I don't want to  
24 interrupt your question, but I'll give you an  
25 example where that's not the case in recreation.



1     If somebody wants to use a recreational facility,  
2     a park, the municipality under New Jersey law,  
3     (A) has a right to charge for the use of that  
4     park, a fee; and (B), if the park was acquired  
5     through Green Acres money, it is subject to  
6     certain regulations, including the fact that if  
7     you are a nonresident of the municipality you can  
8     charge the nonresident -- if you are a  
9     nonresident of the municipality but a resident of  
10    the State of New Jersey, you can charge them  
11    twice the fee you charge a resident.

12                 And if you are a nonresident of the  
13    municipality and a nonresident of the state,  
14    there's no limitation on the fee. So that would  
15    be a record. And I can tell you towns that when  
16    you want to use a park, the only thing they want  
17    is your name and your address so that they can  
18    then decide the appropriate fee to charge you for  
19    the use of that facility. So that's all that  
20    record has on it.

21                 MS. BARBER: Okay. But it has the  
22    record of your name, address, and the fact that  
23    you're going to be using the park.

24                 MR. CAFFERTY: That's it.

25                 MS. BARBER: Okay. But that's not





1       just bare name and address. That is name and  
2       address plus something.

3               MR. CAFFERTY: Fine.

4               MS. BARBER: So name and address  
5       information is always in a context.

6               MR. CATE: Right. What I said  
7       earlier is that you might just aggregate it from  
8       sensitive information.

9               MS. BARBER: Right.

10              MR. CATE: So, for example, if we  
11       collect information, which the State of New  
12       Jersey does on people with communicable diseases,  
13       I think most people would accept that there  
14       probably should be some limit on disclosing the  
15       names and addresses of people who have certain  
16       diseases.

17              On the other hand, I think the state  
18       would be hard pressed to not provide aggregate  
19       information on the number of reported incidents  
20       of those diseases and aggregate information on  
21       the locations of the people who have them. How  
22       many in this county, how many in that county.  
23       But we might disaggregate the actual name and  
24       address from the "What condition do you have?"

25              MS. BARBER: Uh-huh.



1                   MR. CATE: So the purposes, the goal  
2 would be to provide the maximum access consistent  
3 to with whatever the privacy interest is.

4                   MS. BARBER: Okay.

5                   MR. CATE: And disaggregation is  
6 only one way of doing that but I think it's a  
7 very useful way.

8                   MS. BARBER: Okay. Right.

9                   So I actually think that your  
10 position is very close to the recommendation of  
11 the Special Directive Subcommittee which is to  
12 say that different sets of government records  
13 have to be examined to find out what the privacy  
14 interest is.

15                  MR. CATE: I think that's right. I  
16 would characterize it slightly differently.

17                  MS. BARBER: Go ahead.

18                  MR. CATE: I disagree entirely with  
19 the Special Subcommittee's reasoning. And that's  
20 what I came to say, and that's what I said in my  
21 prior statement.

22                  MS. BARBER: Okay.

23                  MR. CATE: Not with its conclusions,  
24 but with it's reasoning.

25                  MS. BARBER: Okay.



1                   MR. CATE: Because once you say the  
2                   Constitution mandates something, then frankly the  
3                   recommendations don't even follow up from the  
4                   reasoning. If the Constitution mandates keeping  
5                   the records private, then the recommendations  
6                   which would allow them to be made public are  
7                   inconsistent.

8                   So my suggestion would be to delete  
9                   everything up until the recommendations. Then  
10                  start with the recommendations which say as a  
11                  practical matter that some records would be  
12                  subject to limits on disclosure because of the  
13                  heightened to privacy interest in matters.

14                 MS. BARBER: Okay, okay.

15                 MR. CATE: I would get there by  
16                 saying the presumption is one of openness.  
17                 That's historically been the presumption. I  
18                 think that is what the Constitution argues for in  
19                 other settings, although does not require in this  
20                 setting. And I think that's consistent with the  
21                 case law. So that the presumption would be any  
22                 information in the state record is available to  
23                 the public who paid to have it collected.

24                 MS. BARBER: Okay.

25                 MR. CATE: Then you would take the



1       step back and say if there are specific and  
2       articulable facts that substantiate a specific  
3       and significant harm to use the language of the  
4       Tenth Circuit, then, of course, we would have a  
5       strong interest, some people would say a  
6       compelling interest, in not making that record  
7       public or in not making all of that record public.

8                       And so this that limited setting you  
9       would then look for the, I would say, least  
10      restrictive way of accommodating that interest  
11      without offending anymore than necessary the  
12      starting presumption which is the public gets  
13      access to that which it's paid to collect.

14                     MS. BARBER: Do you think the least  
15      restrictive way of protecting the privacy  
16      interest might be to release the record but just  
17      redact the home address?

18                     MR. CATE: It could be in some  
19      instances.

20                     MS. BARBER: Okay.

21                     MR. CATE: For example, information  
22      on undercover police officers, I think we have an  
23      interest in knowing how many do we have and where  
24      do they work and what are they paid and so forth.  
25      But one thing I think pretty much all





1 jurisdictions who have looked through this agreed  
2 is we don't want to be disclosing where you go to  
3 find them and their families. And so that might  
4 be the least restrictive thing to protect that  
5 very important public interest.

6 MS. BARBER: Okay.

7 The New Jersey Open Public Records  
8 Law specifically provides that social security  
9 numbers may not be disclosed in public records.  
10 In other jurisdictions, do you have any position  
11 on whether social security numbers should be  
12 disclosed in public records?

13 MR. CATE: I think a blanket rule  
14 against disclosure is too broad. There are many  
15 instances where the public has a legitimate  
16 compelling need to know what the social security  
17 number is; for example, in bankruptcy records.  
18 The purpose of a bankruptcy record is so that the  
19 public can look at it and determine do I have a  
20 debt at stake. And given that social security  
21 number is the most common identifier we use in  
22 this economy, rather than asking is the same John  
23 Smith in that record the John Smith who owes me  
24 money, they're 70,000 John Smiths in this  
25 country, social security number is in fact a very



1       important way of making that linkage. So a  
2       blanket rule that we do not disclose social  
3       security numbers I think broader than is  
4       necessary.

5                       But in the face of such rule, the  
6       next best thing we have by way of identifying  
7       people is address. Is the John Smith who lives  
8       at 123 Main Street the same John Smith who owes  
9       me money ?

10                      MS. BARBER: Okay.

11                      MR. CATE: I don't mean, by the way,  
12       to pick on the John Smiths of New Jersey.

13                      MS. BARBER: Do you personally have  
14       any expectations that -- well, how do I ask this  
15       question?

16                      I mean, you give information about  
17       yourself to the government all the time, right --

18                      MR. CATE: I do.

19                      MS. BARBER: -- for many  
20       interactions with the government?

21                      MR. CATE: And I work for a public  
22       institution.

23                      MS. BARBER: Okay. And so do you  
24       have any qualms at all about your personal  
25       information about Fred Cate being posted on the



1 internet by the government with respect to all  
2 these disclosures he made to the government?

3 MR. CATE: "Qualm" is a tricky word.  
4 I have qualms all the time. And I certainly have  
5 qualms about seeing certain information about  
6 myself made public. Every -- the town in which I  
7 live every single year publishes a list of  
8 faculty salaries. And I never read that list  
9 without feeling somewhat troubled by looking at  
10 it. I think it's an enormously valuable public  
11 service. I'm glad they do it. I'm glad they're  
12 protected by law in doing it. But it doesn't  
13 make me happy when I read my name there.

14 Similarly I'm certain -- I'll give  
15 you an example, the university which I teach  
16 began ten years ago providing a web site that  
17 puts state Supreme Court cases on it. And the  
18 first call we received complaining was from  
19 someone who had been convicted of a crime. His  
20 conviction had been appealed to the Supreme  
21 Court. That record was now part of the internet.  
22 He was very upset because although he had now  
23 served his time and when he applied for jobs,  
24 people would look on the internet, they would see  
25 this and it make it hard for him to lie about the



1 fact he had a criminal record. He had lots of  
2 qualms about that.

3 I think the fact that information  
4 was there was a good thing and served a valuable  
5 public purpose even though I completely  
6 understand his qualms.

7 MS. BARBER: Okay. So do you -- you  
8 heard Guy Baehr's testimony that most people  
9 don't really expect their home address  
10 information to be confidential. Most people have  
11 their information in the telephone book. Right?  
12 And I asked him and I want to ask you, too, what  
13 about the minority group of people who actually  
14 take steps not to have their address in the  
15 telephone book? Do you think the government has  
16 any obligation to maintain their confidentiality  
17 if they've gone so far to give a little bit of  
18 extra money to the phone company?

19 MR. CATE: My answer probably won't  
20 be satisfying because it would be a typical law  
21 professor answer. You know, it depends. You  
22 know, it was Linden Johnson who said he wanted a  
23 one-armed economist so he couldn't say "on the  
24 one hand and on the other hand." But  
25 unfortunately, law professors are even worse





1       about that.

2                     Let me say, I think it's a very  
3       important issue as opposed to protecting the  
4       privacy of addresses where the individual has no  
5       interest in it being kept private, and why is the  
6       state spending money to protect something that  
7       the individual doesn't care about. So I guess I  
8       would have to ask something more about the  
9       context. You know, what is the record, what is  
10      are the steps and what is the reason?

11                    If the reason is "I have an abusive  
12      spouse and it's Protective Order and I'm trying  
13      to avoid that spouse locating me," I think of  
14      course the state should cooperate in that fully.  
15      And my guess is most people would agree with  
16      that. If the reason is "I don't like getting  
17      direct marketing material" and that's one thing  
18      that address information from state records is  
19      frequently used for, I would be very  
20      unsympathetic about that.

21                    As the Supreme Court has said, the  
22      burden of that material is measured by the  
23      distance between the mailbox and the trash can.  
24      I'm not impressed by that burden. The court's  
25      not impressed by it. And I certainly don't think



1       the state needs to spend money trying to come up  
2       with systems to try to protect people who are  
3       more worried about that burden.

4                   I think there are in-between  
5       situations. And that's when I think you would  
6       get into the situation of an opt-out opportunity.  
7       Where the information may be somewhat revealing,  
8       that what it's connected to, as you said earlier,  
9       is something that we might understand there to be  
10      a greater or a more legitimate privacy interest  
11      in or the risk of the information being  
12      disclosed. While it may not be specific and  
13      significant enough to warrant not revealing the  
14      information across the board, we might show  
15      greater sort of recognition provided the  
16      individual might be worried about that. In that  
17      instance, I would think an opt-out would be  
18      the -- sort of, if you will, the least  
19      restrictive way of accommodating that interest.

20                   MS. BARBER: How much discretion  
21      would you give our data records custodians to  
22      make decisions about disclose going on?

23                   MR. CATE: That is probably the one  
24      point at which I disagreed with the prior  
25      witness. Although I don't think actually if we



1       were to sit down together we'd disagree. I think  
2       it was merely a sort of a way in which the matter  
3       was brought up. Not just because I'm a lawyer  
4       and a law professor, I actually think this is an  
5       area where it's critical to have clear laws.  
6       Those laws or Executive Orders -- I mean, it  
7       doesn't always have to be a law issued by State  
8       Legislature, should be something that people in  
9       local offices can follow it with a great degree  
10      of clarity and predictability.

11               I do think -- and I think this was  
12      largely the prior point and I agree with this --  
13      that they are the last bastion, if you will, is  
14      the discretion of the Public Records custodian.  
15      And at the end of the day, no matter how good of  
16      a job the state does in making clear rules, there  
17      will still be a need for that discretion.

18               And therefore the training of those  
19      people strikes me as tremendously important in  
20      the availability of some sort of state level  
21      resource to provide advice because even the most  
22      skilled Public Records custodians face situations  
23      that nobody ever thought of in the state capital.  
24      And so the chance to be able to talk to a state  
25      level professional on this matter I think is a



1       very important way of making sure discretion is  
2       exercised consistent with the law.

3               But let me say, and I'm sure you  
4       well know, you looked at a lot of evidence, but  
5       the consistent experience of journalists across  
6       the country, you could look at collections that  
7       Society of Professional Journalists have done,  
8       other Reporters Committee for Freedom of the  
9       Press, is that the more discretion the local  
10      custodian has the less access you end up with  
11      because access is timely and it's expensive and  
12      it interrupts doing other important public  
13      duties. And so if the state does not say access  
14      is an obligation of operating a state agency,  
15      local records custodians inevitable will air on  
16      the side of not providing access. As a rule, I'm  
17      sure they're exceptions, but I think the evidence  
18      is universal.

19             MS. BARBER: What do you -- well,  
20      let's see, before I go too far afield from the  
21      Draft Report, do you agree with these specific  
22      recommendations at the back of the report? Do  
23      you want to go through them? Would you be  
24      willing to go through them?

25             MR. CATE: I don't mind going





1 through them. Let me get my copy of the report.

2 MS. BARBER: Okay, sure.

3 MR. CATE: Starting on page 36?

4 MS. BARBER: Right, right.

5 With respect to the Specific  
6 Recommendation Number 1 that public agencies  
7 should notify the public that home addresses and  
8 telephone numbers may become public.

9 MR. CATE: Absolutely.

10 MS. BARBER: Do you have any problem  
11 with that?

12 MR. CATE: I totally agree with  
13 that.

14 MS. BARBER: Okay.

15 MR. CATE: If I may just say related  
16 to that, one of the things that I think is the  
17 most valuable about state level public record  
18 debates is they often highlight the fact that  
19 states tend to collect information they don't  
20 need. And one way to avoid the question of "Do  
21 we disclose it?" is don't collect it in a first  
22 place.

23 So if you make an agency provide a  
24 clear short statement of why are we collecting  
25 this information from you and what may be done



1       with it, one effect we always see consistently is  
2       that they collect less information.

3                   MS. BARBER: I'm so glad you made  
4       that point because I think that it's too broad  
5       for this particular report but one that we'll  
6       definitely want to incorporate in the final  
7       report in July of 2004.

8                   How about with respect to Specific  
9       Recommendation 2 that home telephone numbers  
10      should be kept confidential?

11                  MR. CATE: I do not at all agree  
12      with that.

13                  And, again, I would point out there  
14      that the primary -- at least the judge for  
15      polling data -- concern that people suggest about  
16      their home telephone numbers is a telemarketing.  
17      But, of course, now they have a fairly foolproof  
18      of stopping telemarketing by stopping the  
19      activity rather than the information flow which  
20      it's based on.

21                  MS. BARBER: How about Special  
22      Recommendation Number 3 that the Legislature  
23      should identify categories of government records  
24      that should be kept confidential and provide  
25      objective guidelines to record custodians?



1                   MR. CATE: I agree. Although as I  
2                   think I indicated earlier, I would have worded  
3                   that differently, which is the Legislature should  
4                   presume that public records are accessible to the  
5                   public and there should therefore identify  
6                   categories of government records that will be  
7                   contrary to that presumption --

8                   MS. BARBER: Okay.

9                   MR. CATE: -- and provide objective  
10                  guidelines.

11                  CHAIRWOMAN KARCHER-REAVEY: I'm  
12                  going to interrupt. I'm sorry.

13                  Do you think the agencies, the  
14                  governmental agencies, we're trying to think of a  
15                  very efficient way to do business. Sometimes  
16                  legislative action is not the most efficient,  
17                  sometimes.

18                  MR. CATE: I am well aware of that.  
19                  No, no, I think often. But I do not think it has  
20                  to be the Legislature. Although I think again it  
21                  is helpful that the Legislature identifies the  
22                  presumption, which is your records must be open  
23                  to the public unless either (1) they fit within  
24                  an exception we've identified, or (2) and then  
25                  that would be I think where we are talking about



1       this recommendation, you identify a specific and  
2       significant harm that it's necessary to withhold  
3       the record in order to prevent it. And I think  
4       the word "necessary" is important there. In  
5       other words, it's not just convenient, but  
6       actually you cannot solve it but for withholding  
7       the record.

8                       MS. BARBER: Okay.

9                       And then how about for Number 4, the  
10       public agency should program their computers to  
11       collect but not disclose home address and home  
12       telephone information.

13                      MR. CATE: You know, I think I  
14       disagree with that. I'm not entirely certain I  
15       understand it. When you asked this of the prior  
16       witness, I was looking at it then.

17                      First of all, I wouldn't program  
18       them to collect it to start with. I would want  
19       first to know do we have a reason to collect it.  
20       If I don't have a reason to collect it, why have  
21       them automatically ask for it. And second of  
22       all, once having collected it, why have them  
23       automatically not disclose it. So I would  
24       reverse both. I would say public agencies should  
25       program their computers not to collect





1 information they don't need. And if they collect  
2 it, to disclose it to the public unless there's a  
3 specific legal reason not to.

4 MS. BARBER: Okay. Okay.

5 Now let's actually go a little  
6 afield from the Draft Report and you mentioned  
7 telemarketing. And I wanted to pick up on that a  
8 little bit.

9 Do you have any position on  
10 restrictions on commercial use of public records?

11 MR. CATE: I do have a position.

12 MS. BARBER: What is that?

13 MR. CATE: I don't think they work  
14 terribly well for two reasons. One is I think as  
15 a matter of theory they are a bad idea. I think  
16 we don't want to ask why are you asking for the  
17 public record, and I think it's a mistake in a  
18 democracy to do so.

19 Second of all, even though many  
20 states have tried in various legislations, study  
21 commissions and so forth, to draw bright lines  
22 between commercial use and public interest use.  
23 And as you know, we draw that line in the Federal  
24 Freedom of Information Act for purposes of  
25 getting access, but for purposes of fee



1 remission. Public interest requesters pay less  
2 or pay nothing; commercial users pay more. It's  
3 very difficult to actual draw that line  
4 especially since most uses are intermixed.

5               So, for example, the FBI uses public  
6 records that's presumably a public interest not a  
7 commercial use. Where does the FBI get its  
8 public records? Well, it buys them from Lexis.  
9 Well, Lexis is a commercial supplier. So when  
10 Lexis comes to New Jersey and ask to buy a bulk  
11 set of public records, is that a commercial use  
12 or public use?

13              Well, one alternative is to say to  
14 Lexis and West Law and Equafax (ph) and Axiom and  
15 Polk (ph) and all of the other companies that are  
16 involved in this, fine now you have to verify  
17 what your individual users are using it for. But  
18 that is fairly unworkable. I mean, that's  
19 pushing the burden so far away and is turning  
20 private entities into sort of state agencies in  
21 terms of verifying which use is for what.

22              The other part of that which worries  
23 me from a practical side is although the FBI's a  
24 huge user of public records, it doesn't use  
25 anywhere near enough to cover the cost of



1     collecting them by these commercial entities. So  
2     if we don't let the commercial entities use them  
3     for commercially viable purposes, purposes which  
4     they can make money that then also funds the  
5     availability of those records for public interest  
6     uses, which typically pay a lower price and  
7     effectively are using a subsidized record at that  
8     point.

9                     MS. BARBER: United States Supreme  
10    Court had a case a couple of years ago that I  
11    think the nickname was the "jail mail case" and I  
12    think the official name is United Reporting  
13    versus somebody or other, but that was the case  
14    out in California where -- well, maybe you  
15    remember better than I do -- but as I recall, the  
16    state of California had some restrictions -- or  
17    maybe it was the City of Los Angeles. They had  
18    some restrictions on the commercial uses that  
19    could be made of arrest data or conviction data.  
20    And the United States Supreme Court upheld those  
21    restrictions saying that that was okay.

22                    Tell me what you remember of that  
23    case and what your take is on that.

24                    MR. CATE: United Reporting involved  
25    the state law which obligated municipalities to



1 not release the address information with people  
2 arrested and witnesses from public records. So  
3 you had to provide their names but not their  
4 addresses. And it differentiated it between two  
5 classes of users. So it provided you could only  
6 provide the address information to a user who  
7 would not use it for the purpose of contacting  
8 the individual. And therefore -- and this was  
9 clearly intended, it wasn't difficult at all to  
10 figure out -- to deal with attorneys and driving  
11 schools and drunk driving programs and insurance  
12 firms that would use this information to contact  
13 people to solicit business. So that journalists  
14 could use it to publish or researchers could use  
15 it for research, but that anyone who's going to  
16 use it for the purpose of contacting the  
17 individual would be prohibited from doing that.

18 A case was brought as a facial  
19 challenge to the statute. So it never had gone  
20 into effect. It was simply brought on the base  
21 it was unconstitutional on its face. And the  
22 Supreme Court ruled 6-3 that it was not  
23 unconstitutional on its face. But it is a very  
24 complicated set of opinions. Because Chief  
25 Justice Renquest (ph) writing for the majority





1       says because it is a facial challenge we apply a  
2       higher standard than if it were an as-applied  
3       challenge.

4                   And the two concurring Justices  
5       wrote that they might view the matter differently  
6       if it had actually been applied. But because it  
7       was facial they would rule with the Chief  
8       Justice. And Justice Stevens wrote for the  
9       descent a very strong descent in which he pointed  
10      out what he called, and I quote, the overall  
11      irrationality, close quote of the statute. The  
12      purpose of which was to protect privacy. So it  
13      would not let you write the individual, but you  
14      could write about the individual.

15                   And how did this protect privacy?  
16      Does getting a letter invade your privacy more  
17      than reading about yourself in the paper in the  
18      morning so that the statute from his point of  
19      view and other descender's point of view simply  
20      made no sense at all.

21                   As you can undoubtedly tell, I think  
22      the case was wrongly decided. I would agree that  
23      it was overall an irrational statute. But I  
24      agree as a matter of purely technical  
25      constitutional law as a facial challenge, even if



1 the majority may have had the correct outcome. I  
2 think if it had been brought as applied  
3 challenge, if someone had said "This law's been  
4 applied to me, I now cannot communicate with  
5 these people," the decision would likely have  
6 come out the other way.

7 MS. BARBER: Actually, I want to go  
8 back to the FOIA cases When you're talking about  
9 drawing lines between commercial uses various  
10 public interest uses. In the FOIA cases how did  
11 the courts treat newspapers? Because newspapers  
12 are usually -- they're commercial in a sense, but  
13 they're also public interest in a sense.

14 MR. CATE: They're always public  
15 interest for FOIA purposes.

16 MS. BARBER: I'm going to get the  
17 transcript so I don't know why I'm writing all  
18 this stuff down.

19 CHAIRWOMAN KARCHER-REAVEY: Because  
20 you're a lawyer.

21 MR. CATE: Neither does the court  
22 reporter.

23 CHAIRWOMAN KARCHER-REAVEY: Because  
24 you're a lawyer.

25 MS. BARBER: Okay. I also wanted to



1       ask you about the Remsburg (ph) case. Yes, you  
2       do know this case. This is the Amy Boyer (ph)  
3       case out of New Hampshire where Amy Boyer (ph)  
4       was murdered by a stalker who got information  
5       about her from a commercial database company  
6       called Docu-Search (ph). And the New Hampshire  
7       Supreme Court wrote an opinion saying that  
8       commercial databases have some kind of duty of  
9       care to the individuals whose data is in the  
10      database.

11               So my question is what do you think  
12      of that case and do you think that the government  
13      has a duty of care to individuals whose data is  
14      in government databases.

15               MR. CATE: Well, I would say bad  
16      facts make bad law, and this is a good example of  
17      that. Criminals always obtain information from  
18      somewhere in order to perpetrate their crimes.  
19      That may include public sources of data; that may  
20      include private sources of data; that may include  
21      just simply observing the data. I watch what  
22      behavior you engage in and that way I learn when  
23      it's safe to rob your house.

24               I think as a practical matter to try  
25      to trace liability back the source of data is of



1       legally unjustifiable and practically unworkable.  
2       I do think there may be duties owed by custodians  
3       of data, for example, relating to accuracy of the  
4       data, but not related to what a third-party might  
5       do with the data. That, by the way, is fairly  
6       consistent with what the current state of the law  
7       is relating to newspapers. Newspapers and other  
8       publications have really no duty to third parties  
9       that someone might read the newspaper, act on  
10      something, and then cause harm to a third-party.

11               As a practical matter, newspapers  
12      rarely have a duty even if they get information  
13      wrong, but at least the case is analyzed  
14      differently, that it's a different question if  
15      you are inaccurate in your data and you behaved  
16      unreasonably with relation to that accuracy than  
17      if you supplied data that's used to cause harm.  
18      In which case, universally there is no liability  
19      for that. And I think in a society that believes  
20      in the free world of information, that really has  
21      to be the rule of law.

22               MS. BARBER: So then the New  
23      Hampshire Supreme Court just got it totally  
24      wrong?

25               MR. CATE: Absolutely.





1 MS. BARBER: Un-huh, okay.

2 MR. CATE: I mean, for  
3 understandable reasons confronted with those  
4 facts I think many courts would get it wrong.  
5 Nevertheless, I think with calmer reflection if  
6 would be seen to be incorrect.

7 MS. BARBER: Do you think that the  
8 government's duty of care to individuals with  
9 respect to their personal data in government  
10 databases, do you think the duty of care is  
11 adequately captured in the Fair Information  
12 practices that have been adopted by the European  
13 Union?

14 MR. CATE: I think that Fair  
15 Information practices are virtually useless and  
16 that they have been given far too much press for  
17 far too little purpose. It's a little bit like  
18 believing in motherhood and apple pie, who could  
19 be against them? You know, they call for  
20 fairness and accuracy and accountability, and  
21 these are all principles you could get a football  
22 stadium full of people to stand up and agree to.  
23 The problem is once you apply them what does that  
24 mean, accuracy and accountability and so forth.

25 And so it is -- I can't think of a



1       situation in which it's useful to think in terms  
2       to the Fair Information practices because the  
3       devil's in the details and they're simply far too  
4       abstract of a level. I would point out we signed  
5       on in the United States to those practices when  
6       we signed to OECD convention on privacy. The  
7       European -- the twelve member states of the  
8       European Union signed on to those same Fair  
9       Information practices. Our laws could not be  
10      more different, but we all believe in the same  
11      principles. So I think those principles are  
12      really pointless as a guide for law or policy.

13               I think the government's primary  
14      duty relates to one of accuracy in relation to  
15      the use of the information. So, for example, if  
16      the government tells me I owe them taxes when I  
17      don't, I would say that's breached the duty.  
18      They have a duty to accurately assess or  
19      aggregate the information that I supply to them  
20      and my employer supplies to them. I don't think  
21      it's a level of sort of abstract accuracy. Like  
22      if my mailing address listed in the Park and  
23      Recreation's database isn't correct, that duty  
24      has been breached. I think because there's no  
25      real consequence, it would be meaningless to try



1 to craft a legal duty there.

2 MS. BARBER: If the duty is breached  
3 in a very concrete way, what kind of remedy do  
4 you think should be available to an individual?

5 MR. CATE: Well, usually statutes  
6 already provide those remedies. In other words,  
7 usually they would pretty much carved out those  
8 areas. In some instances that's not the case.  
9 So for example, people who get arrested because  
10 the police can't keep straight which John Smith  
11 they're looking for, they have a cause of action.  
12 And in some circumstances under a Section 1983  
13 action or some other type of remedy, but that  
14 duty's not very clearly spelled out.

15 And, frankly, it might be useful in  
16 some settings to spell it out more clearly when  
17 the state acts on an individual by virtue of not  
18 having good recordkeeping systems.

19 Let me say just so it's not in any  
20 way obscure, I clearly believe the government  
21 owes a higher obligation -- legally owes a higher  
22 obligation than do private companies or nonprofit  
23 groups or universities or alumni associations or  
24 churches or synagogues or other users of  
25 information.



1                   The government has a Fourth  
2    Amendment of the set of issues when it collects  
3    information and the government's unique in not  
4    operating in a competitive environment. If I  
5    don't like Indiana's tax policy, what they do  
6    with my tax information, I can't choose to pay  
7    taxes in New Jersey instead. I'm stuck with that  
8    tax policy. If I don't like Visa's way of  
9    handling my credit card, I can carry Mastercard.  
10   At least it's a competitive market.

11                  So I think for both constitutional  
12   and practical reasons the government does have a  
13   higher obligation with regard to its own use, its  
14   own collection and use of the information.

15                  MS. BARBER: I'm just going to keep  
16   going if you don't mind.

17                  MR. CATE: It's fine by me as long  
18   as you all don't --

19                  CHAIRWOMAN KARCHER-REAVEY: We have  
20   to stay until seven.

21                  MR. CATE: Is that a rule?

22                  CHAIRWOMAN KARCHER-REAVEY: Yes, we  
23   have our orders from our liaison here.

24                  MS. BARBER: We announced to the  
25   public we would be here until seven.





1                   I can't tell you how much I  
2     appreciate this. I think this is just wonderful  
3     input. I want to get into an issue that the  
4     Commission's been sort of talking about, and I'm  
5     not even sure how to formulate my question, but  
6     it has to do with sort of technology creating new  
7     opportunities for information disclosure. And I  
8     want to get at this in a couple of different  
9     ways.

10                  One is -- and this is related to the  
11     commercial use question -- now the Department of  
12     Motor Vehicles used to generate a little revenue  
13     by selling motor vehicle records. It didn't cost  
14     a lot. You could go and get somebody's driver's  
15     license information, maybe their record, for  
16     about ten bucks. And Congress put the cabosh on  
17     that after Rebecca Schafer was murdered, I think  
18     by somebody using the driver's license records.

19                  So motor vehicle records can't be  
20     used anymore, but it seems like there ought to be  
21     other kinds of state and government records that  
22     would be worth something. Other examples that  
23     we've seen and learned about is geographic  
24     information systems in which governments make  
25     huge investments. I am mean very costly, very



1       elaborate, very beautiful technology. And if  
2       that information in its aggregate form becomes  
3       part of a public record, somebody requesting the  
4       GIS could just say "Give me a copy of the GIS.  
5       I'll pay you the few dollars to copy it onto my  
6       CD. And here I'll hand you the CD so I don't  
7       have to pay for that either."

8                    Could you share any thoughts or  
9       insights with us about the possibility of the  
10      government recouping some of the costs of making  
11      a GIS and some of the burden that might be placed  
12      on requesters who ask for information that would  
13      otherwise be just in the public domain at no  
14      cost? What are your thoughts on that?

15                   MR. CATE: I think it's very  
16      difficult issue. Both because there's a real  
17      practical pressure which is to generate revenue  
18      and because -- you know, there's sort of a  
19      democratic principle here which is the taxpayers  
20      had paid once already to have the information  
21      collected. So to charge the taxpayers a second  
22      time to get the information kind of doesn't sit  
23      right I think with many people. Most state laws  
24      provide and it seems this is reasonable, it  
25      certainly is legal, that you can recoup the cost



1 of searching for the information and providing  
2 the information.

3 So if I ask you for a set of records  
4 or ask you for a set of GIS files that the cost  
5 of responding to my request can be passed on to  
6 me, although many states do separate between  
7 public interest requesters and nonpublic interest  
8 requesters in terms of how much of that cost can  
9 be passed on.

10 Many states set prices higher than  
11 actual cost. So they'll say "Yeah, we'll just  
12 charge you a fair price for photocopying and its  
13 \$1.50 a page." Well, as we all know only a law  
14 firm would do that or maybe a university. That's  
15 not really what it cost, and you'd have to  
16 calculate a lot of overhead in to get it to come  
17 up with that. I think where we get more of that  
18 difficult feeling is the idea of really profiting  
19 from it. Like this information is worth a  
20 million dollars in the market. So even though we  
21 might be able to charge you a thousand for  
22 providing it, we want to get someplace in the  
23 difference. You know, we want a hundred thousand  
24 for providing it. And I think as a general  
25 principle that should be discouraged.



1 MS. BARBER: Why?

2 MR. CATE: Well, for a number of  
3 reasons. One, it encourages agencies to collect  
4 information they may not need but they think they  
5 can make money from. I think it runs the risk of  
6 diverting state agencies from their other  
7 important tasks towards sort of deinformation  
8 brokerage business. Which for quite some time  
9 under a Federal Executive Order has been  
10 prohibited at the federal level and I think it  
11 makes sense to prohibit that at the state level  
12 as well. Unless you're filling in an information  
13 gap that nobody else fills, that there's no  
14 commercial or noncommercial provider, this state  
15 really should not be in the business of trying to  
16 put together information and sell it for a  
17 profit.

18 It also ignores the fact that in a  
19 responsible public record system there are often  
20 benefits that float both ways. For example, many  
21 commercial requesters of information,  
22 particularly the aggregaters who then provide  
23 service to other users, attorneys or private  
24 investigators or whatever, actually enhance the  
25 data. In some instances, the contracts under





1       which they obtain are from the state provide they  
2       give the enhanced data back.

3               So, for example, your voter rolls  
4       might be improved by the fact that if the  
5       information's verified by an axiom database,  
6       which is much more accurate on average than the  
7       average government database in terms of addresses  
8       because it's aggregating that data and working  
9       with it, you get back better data. You get those  
10      addresses corrected or you get zip plus four  
11      added to them, or you get them assigned in a  
12      postal presort code order. That there are ways  
13      in which the partnership between public records  
14      custodians and private companies that help make  
15      that access more widely available are very  
16      beneficial to the public, to the government, and  
17      to the companies involved.

18             And I think if you create that into  
19      more of a for profit relationship, we want you to  
20      pay us the actual commercial value of this  
21      information, those other benefits are likely to  
22      evaporate. What's the likelihood the companies  
23      are going to say "We're going to give it back to  
24      you enhance"?

25             So I think, you know, there are a



1 lot of sort of complicated issues in there. All  
2 of which to my mind sort of side with not trying  
3 to allow profiting off the data.

4 MS. BARBER: Have you written on  
5 this?

6 MR. CATE: Not particularly. I mean  
7 maybe in some vague disparate places, but nothing  
8 specifically on this together, no.

9 MS. BARBER: Any other resources you  
10 could point us to from this one?

11 MR. CATE: Not that I can think of  
12 off the top of my head.

13 MS. STARGHILL: I'll be calling you  
14 on that one.

15 MR. CAFFERTY: If you could ask you  
16 kind of a opposite kind of question in the same  
17 area of commercial use, one of the charges of  
18 this Privacy Commission and the Open Public  
19 Records Law which created it is to also look at  
20 the need for privacy in light of the need for  
21 access.

22 One of the issues that I see  
23 confronted with with the municipality I do work  
24 for is kind of the opposite of what Graceson (ph)  
25 is raising -- but raises in access issue. And I



1       wonder if you have any thoughts on it is this  
2       municipality leases a software program from a  
3       company to run its tax and assessment data. The  
4       tax and assessment data is often requested in the  
5       old days in paper form by companies who offer  
6       private tax and assessment searches which they  
7       sell to title companies, et cetera.

8               The municipality has received a  
9       request from one of these companies that use tax  
10      and assessment data for a bulk download of the  
11      data from the municipality. Now, the bulk  
12      download of the data -- and I'm getting beyond my  
13      expertise in computers which is most limited --  
14      but apparently it requires some manipulation of  
15      the program which can only be done by the  
16      licensor or supplier of the program.

17             The licensor or supplier of the  
18      program has said to the company requesting the  
19      bulk download, "We're willing to do this for a  
20      fee." And the company has understandably said  
21      "We'll pay the fee so long you agree we have the  
22      exclusive right to bulk download this data." And  
23      the municipality is currently taking the position  
24      while we have a right an obligation to provide  
25      for access, we believe that that kind of an



1 arrangement is contrary to the public interest.

2 I'm wondering if you've seen that or how --

3 MR. CATE: Many times and frankly in  
4 all sorts of different varieties. So if I could  
5 just for a moment expand on the question and I'll  
6 try to answer it. Which is, this sort of issue  
7 first came up when requesters wanted data  
8 electronically and government agencies said "No,  
9 you can only have it in print." So I want your  
10 electronic database of the voter rolls because I  
11 want to mail something to people and you say "No,  
12 I'll give you a printout of it."

13 This is the most recent conversion  
14 of this type of technology-related problem which  
15 is you say "Yeah, I'll provide it to you, but  
16 it's going to be useless because you're going to  
17 need the software, and we don't have the software  
18 to give you or you can go buy it or what have  
19 you."

20 The general principle on the federal  
21 level, Congress adopted E-FOIA in 1998 which  
22 provided that as a matter of law an agency must  
23 provide the documents in any format requested if  
24 they maintain them in that format. So if I ask  
25 for it in an XML file, you don't have to convert





1     it to XML if you don't have XML. But if you keep  
2     them in XML, you don't get to print them out and  
3     hand me a printed copy when you could of just as  
4     easily handed me the disk.

5                     Moreover, the E-FOIA provides that  
6     an agency that receives many requests -- I forget  
7     the exact term of the law -- but that receives  
8     repeated requests -- I think that's the term used  
9     in the law -- for data in a given format shall  
10    keep the data in that format unless there's a  
11    specific reason not to. So if you say "No, I'd  
12    really like to use Word Perfect," but the last  
13    thousand requesters have asked for it in a word  
14    file, you may have a legal obligation, you would  
15    under federal law, to keep it in Word as well.  
16    It's not a tremendous burden, and it would be  
17    much more useful to the public.

18                    At the end of the day though, if you  
19    use a software that's not widely available and  
20    you don't have as a government agency the license  
21    to pass that software on to others, I don't think  
22    the law should require that you either go out and  
23    buy that license so you can share it with others,  
24    but I don't think it permits you to enter into an  
25    exclusive distribution agreement so that the



1 provider can only supply the license to one  
2 party.

3 From my point of view -- I know I  
4 keep coming back to repeating the same point,  
5 but I think the point is so fundamental that it  
6 bears repeating, which is the overall principle  
7 here is one of providing access. In a democracy,  
8 in a system in which the people or  
9 constitutionally sovereign, they are entitled to  
10 have whatever the government has unless there is  
11 specific reason to withhold it. National  
12 security would be one reason, certain types of  
13 privacy interests where you can identify specific  
14 and significant harm would be another reason.

15 But that the overall principle is we  
16 want you to have it. We would be thrilled if you  
17 would come to our agency to get it. We're going  
18 to have bake sales to encourage you to come down  
19 and look at the public records. You know, every  
20 American should ask for their own record from the  
21 state and from the federal government. You  
22 should know what the government's collecting  
23 about you.

24 MS. BARBER: But should you have the  
25 right to get that information about everybody



1       else?

2                   MR. CATE: Well, I mean, this is the  
3       exact issue on the table. And the answer I would  
4       say is, yes, unless you can identify a privacy  
5       interest that warranted protecting. There would  
6       be disagreement about this. There would be  
7       disagreement no matter about what two people you  
8       had in the room. I don't think any two would  
9       agree universally on what that would be.

10                   To an extent I think what matters is  
11       the process. In other words, if you start from a  
12       presumption of openness and then you say we're  
13       going to have a process where the government will  
14       articulate why it's not providing access to this  
15       record or to this data field within this record,  
16       of even if reasonable people differ at the end of  
17       the day, my guess is the outcome would be  
18       overwhelmingly satisfying to most people as well  
19       as legally defensible.

20                   I think the problems where you  
21       either don't have that process, you know, we're  
22       just going to rely on the discretion of the  
23       custodian or you approach it from a different  
24       presumption; namely, one of, well, maybe these  
25       records shouldn't be made accessible at all



1       unless the newspaper comes and makes a compelling  
2       case why they should get it. And that's when I  
3       think you have both constitutional but also very  
4       practical problems.

5                   MS. BARBER: What about the mosaic  
6       effect? You know you can take a little bit of  
7       information from here and a little bit of  
8       information from there, and the next thing you  
9       know you can make a bomb. Or you can make a tidy  
10      profile about a particular individual who never  
11      dreamed they were disclosing so much information  
12      about themselves.

13                  MR. CATE: Yes and no. I think  
14      theoretically what you say is accurate. And I  
15      think there will come a time probably in our  
16      lifetime when that is fairly true. It's clearly  
17      not today, despite the number of people like me  
18      who go around talking about the power of  
19      technology. Look at all the junk mail you get  
20      that doesn't interest you. So despite the fact  
21      that they've spent millions coming up with these  
22      algorithms to ensure that they are only sending  
23      you things that will interest you, they're  
24      failing miserably.

25                  We know the federal government





1 cannot identify people who get on airplanes  
2 accurately. We know they have a watch list that  
3 they cannot get the nine watch list to work  
4 together as one. We know that they stop people  
5 with the same last name even without identifying  
6 who is the actual person they're after.

7 So for all of the vaunted power of  
8 technology to build these mosaic pictures that  
9 will accurately identify you and your interest,  
10 all we know is that it doesn't work.

11 MS. BARBER: It will.

12 MR. CATE: Now it may work one day.  
13 I don't think we're going to stop it from working  
14 by withholding bits of information. In other  
15 words, all we'll do then is ensure that we get  
16 less accurate portraits. I don't see the  
17 portrait painters as going away. So I think it's  
18 a little bit like trying to control crime by  
19 controlling access to the highways. If you don't  
20 let people drive, I guarantee you bank robbers  
21 will come to an end because it is very hard to do  
22 a fast getaway on foot.

23 So if we just stop accessibility to  
24 the highways, we could put an end to most perhaps  
25 all violent crime. It's not a workable solution



1       though. I think the same is true here. If we  
2       stop imported information flows, we may diminish  
3       some harms done with that information. I think  
4       the much better, wiser, and more effective and  
5       certainly more constitutional approach is to  
6       focus on the harms.

7               People didn't like telemarketing, we  
8       have a law now that says you can stop  
9       telemarketing. If you're really that upset by  
10      the junk mail you get, under Rowan vs. United  
11      States you can block the junk mail if you really  
12      want to. I think you postmaster would look at  
13      you a little oddly if you went down and asked for  
14      the form to do it. But nevertheless you're  
15      legally entitled to do it. You don't like  
16      getting spam, I'll sell you a filter for \$19 that  
17      will take care of 90 percent of your spam.

18             So we could try to address these  
19      issues by saying let's just cutoff the flow of  
20      information. But of course then with that will  
21      go instant credit and identity verification  
22      on-line and being able to do commerce with  
23      distant people. And we are the only country in  
24      the world where you can get approved for a  
25      mortgage the same moment you apply for it. And



1 all of that depends on vastly open public  
2 records.

3           So what we have to recognize we're  
4 going to throw out a lot if we try to control  
5 what we perceive to be the problems by shutting  
6 off the information itself. And, in fact, I  
7 think most people won't be willing to do that.  
8 You know, there's a very good federal fed study  
9 suggests that mortgage prices in this country are  
10 two full percentage points lower on average  
11 because of accessible information flows. It's a  
12 very complicated analysis that many people have  
13 tried explained to me, and I'm not sure I  
14 understand even now.

15           But if we just for a moment accept  
16 that it's true, I don't mean all government  
17 reports are true, but if it is accurate, you  
18 know, how many people would trade 200 basis  
19 points on their mortgage for not being able to  
20 get their address out of a public record. I  
21 don't know anyone who would. That would be fifty  
22 or sixty thousand dollars to the average American  
23 family. And what we know is if you offer 50  
24 cents off the diet coke, they'll give you their  
25 life story to get it.



1                   So I don't mean people don't value  
2     privacy, I mean, we value it attention with other  
3     values. And until someone comes up with a way of  
4     saying you could have all these other values and  
5     have this universal control over privacy, I'm  
6     nervous about trying to do that. So at the end  
7     of the day I would rather say as a government  
8     agency, face it, you live in the public world.  
9     People are going to know things about you. It's  
10    just the way it is.

11                  You get a license from the  
12    government, people are going to know that. If  
13    you serve on the Zoning Commission, people are  
14    going to be able to check to see if you comply  
15    with zoning law. That's just how it is. That's  
16    what we call accountability. And it may require  
17    trading some privacy, but we can do something  
18    about the specific harms, the particular harms.

19                  I'm not sure trying to do something  
20    about these sort of generalized, I'm  
21    uncomfortable about this information being out  
22    there. I'm not sure it's exactly worth the  
23    effort.

24                  MS. BARBER: So you're with Scott  
25    McNeeley (ph): You have no privacy, get over it.





1                   MR. CATE: Not at all. I think you  
2                   have a lot of privacy. I think you don't get  
3                   privacy on the whole from law. I think you get  
4                   it from practice. You know, the suggestion made  
5                   earlier, which I don't know if people thought was  
6                   facetious or people do it or not, but about what  
7                   address you list on things or what phone number.

8                   MS. BARBER: I took it very  
9                   seriously, yes.

10                  MR. CATE: I haven't listed a home  
11                  phone number on a document I would guess in 20  
12                  years. Even a government document, it says home  
13                  phone number, I just list my cell phone. They  
14                  call it, they'll get me. I'm willing to fight  
15                  about that in court if they think it's that  
16                  important.

17                  MS. BARBER: Do you mind them giving  
18                  out your cell phone number under Public Records  
19                  request?

20                  MR. CATE: I'm not thrilled by it,  
21                  but I certainly can understand that they do it.

22                  MS. BARBER: Well, it sounds like  
23                  you've taken a step to protect your telephone  
24                  number.

25                  MR. CATE: Absolutely. And frankly



1       if you took the money that would be the economic  
2       cost of the types of privacy protections that  
3       would start closing public records and invested  
4       it in public education as well, my guess is  
5       you'll get a bigger bang for the buck.

6                   You know, at the very time when I go  
7       around talking with legislatures and government  
8       agencies and so forth, all the time I see in my  
9       own university -- let me give you a very specific  
10      example. My university has twice in the past  
11      five years posted a subgroup of students social  
12      security numbers on the web, accidentally. It  
13      was a major outcry, big brouhaha, a lot of  
14      concern was there going to be identify theft that  
15      came from that. Today, there's not been a single  
16      reported incident of identity theft from doing  
17      that.

18                   On the other hand, we routinely have  
19      fraudsters who show up on campus with clipboards  
20      and ask students the most personal questions,  
21      your bank account, you credit card number,  
22      because they say they're from a bank and it's a  
23      credit card application. Well, as long as  
24      students are going to give away their entire  
25      credit history to anyone who asks, no amount of



1       legal protection for violations for putting  
2       social security numbers on the web are going to  
3       protect them.

4                       That's something practical we could  
5       do instead of worrying about what if I get the  
6       address of a New Jersey resident from the state  
7       records. So I just think we need a sense of  
8       perspective. I think this is true of all of us.  
9       I certainly don't mean to focus on this thing.

10                      MS. BARBER: But so you don't see  
11       the social security number on the web as a harm  
12       in and of itself?

13                      MR. CATE: I think there's no  
14       evidence at that it is a harm in and of itself,  
15       no.

16                      MS. BARBER: And the remedies for  
17       misuse or abuse of personally identifiable  
18       information should be statutory in your view?

19                      MR. CATE: Yes.

20                      CHAIRWOMAN KARCHER-REAVEY: I know  
21       you commented briefly, but would you care to add  
22       anymore to this question of can you charge and  
23       how much should these public agencies be able to  
24       charge?

25                      MR. CATE: I think the charge should



1       rationally related to the cost of providing the  
2       information.

3                   CHAIRWOMAN KARCHER-REAVEY:   And  
4       that's the time spent copying it?

5                   MR. CATE:   And the time spent  
6       searching for it.   And would I only add to that  
7       that I think it is a good thing that many states  
8       and the federal government provide that certain  
9       categories of request almost always includes the  
10      press and researchers usually can only be charged  
11      the actual cost to providing it not the search  
12      cost.

13                  CHAIRWOMAN KARCHER-REAVEY:   Can you  
14      define "researcher"?   Because we've had some fine  
15      people in here.

16                  MR. CATE:   I would say me and people  
17      that look like me, but that probably wouldn't do  
18      it.

19                  CHAIRWOMAN KARCHER-REAVEY:   They  
20      didn't.

21                  MR. CATE:   Usually it's described in  
22      terms -- I wish I could remember the exact  
23      definition -- of intended for to be used in  
24      publication or news reporting that would be  
25      disseminated to the public.   So if someone's





1 writing a book and they want the information that  
2 would count.

3 CHAIRWOMAN KARCHER-REAVEY: But if  
4 they just wanted the information?

5 MR. CATE: Then it would not count,  
6 that's right.

7 CHAIRWOMAN KARCHER-REAVEY: Anybody  
8 have any other questions or comments?

9 We really appreciate you being here.

10 MR. CATE: I greatly appreciate the  
11 chance.

12 CHAIRWOMAN KARCHER-REAVEY: We're  
13 going to bring your name to the Commission and  
14 people may contact you if that's all right.

15 MR. CATE: Certainly.

16 Thank you very much for your  
17 patience.

18 (Break was taken.)

19 (Back on the record.)

20 CHAIRWOMAN KARCHER-REAVEY: We'll go  
21 back on the record. And I don't think we're  
22 going to take any more testimony today because no  
23 one's here. I thank the members of the  
24 Subcommittee for being here. I know it's not  
25 easy for any of us and I appreciate it, and I'll



1       see you tomorrow.

2                       (HEARING CONCLUDED AT 6:45 P.M.)

3

4

5                       C E R T I F I C A T E

6

7               I, LINDA P. CALAMARI, a Notary Public of the  
8       State of New Jersey, do hereby certify the  
9       foregoing to be a true and accurate transcript of  
10      my original stenographic notes taken at the time  
11      and place hereinbefore set forth.

12

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LINDA P. CALAMARI

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19      Dated:   JANUARY 9, 2004.

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